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# CERTIFICATE

## Supreme Court of the United States

### OCTOBER TERM, 1930

### No. 138

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, AND DE SYLVA, BROWN & HENDERSON, INC., A CORPORATION,

*vs.*

JEWELL-LA SALLE REALTY COMPANY, A CORPORATION

### No. 139

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, AND LEO FEIST, INC., A CORPORATION,

*vs.*

JEWELL-LA SALLE REALTY COMPANY, A CORPORATION

### No. 140

JEWELL-LA SALLE REALTY COMPANY, A CORPORATION,

*vs.*

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, AND LEO FEIST, INC., A CORPORATION

ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

FILED MAY 22, 1930

(35,052, 35,053, 35,054)

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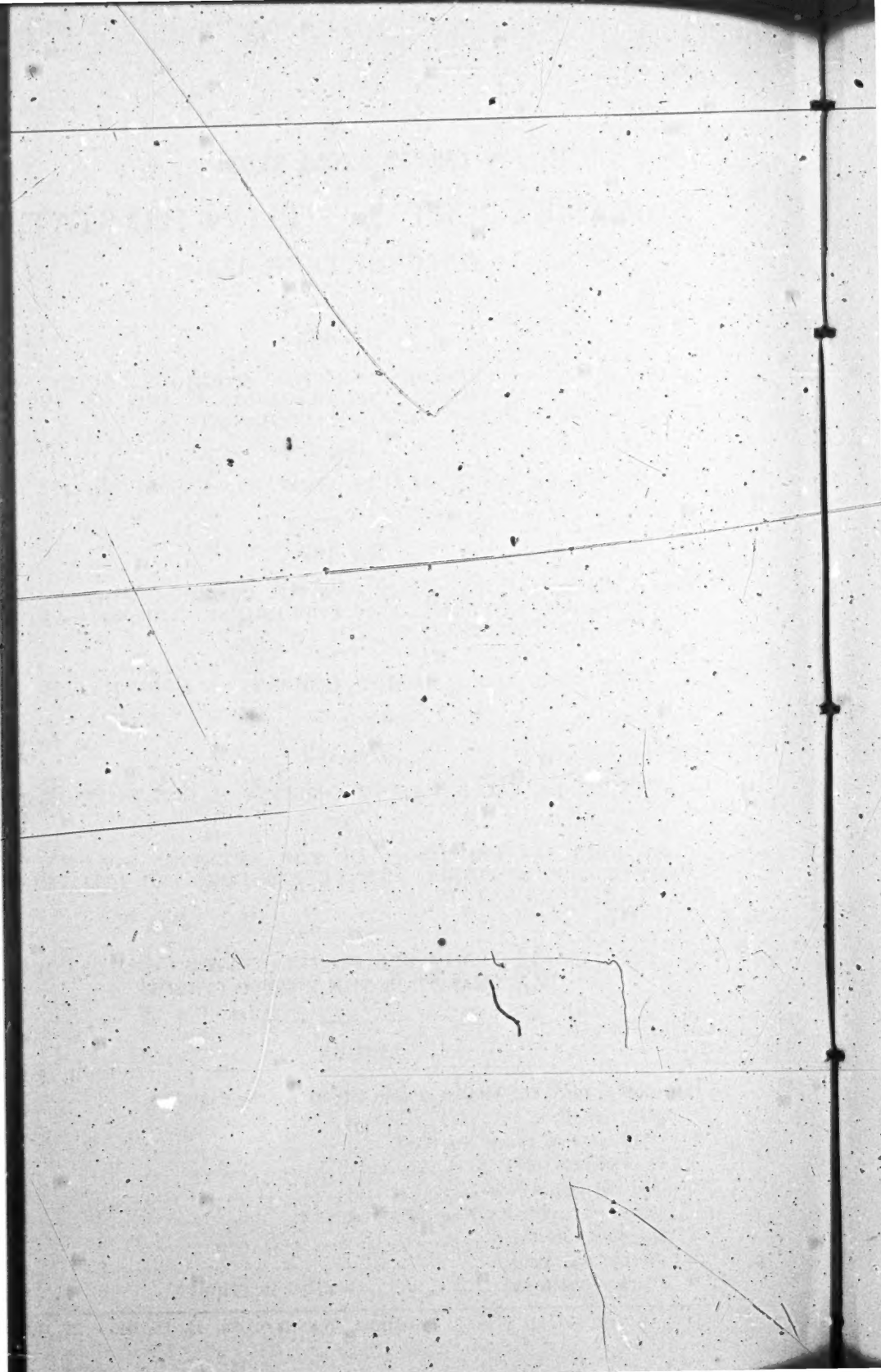

[fol. 1]

**IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, MAY TERM, 1930**

No. 8680

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and De Sylva, Brown & Henderson, Inc., a Corporation, Appellants,

vs.

JEWELL-LA SALLE REALTY COMPANY, a Corporation, Appellee

No. 8681

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a Corporation, Appellants,

vs.

JEWELL-LA SALLE REALTY COMPANY, a Corporation, Appellee

No. 8689

JEWELL-LA SALLE REALTY COMPANY, a Corporation, Appellant,

vs.

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a Corporation, Appellee

Appeals from the District Court of the United States for the Western District of Missouri

Mr. Thomas G. Haight (Mr. Maurice J. O'Sullivan, Mr. Nathan Burkan, Mr. E. S. Hartman, and Mr. Louis D. Frohlich were on the brief) for Gene Buck, as President, etc., et al.

Mr. Charles M. Blackmar and Mr. Kenneth E. Midgley (Messrs. Meservey, Michaels, Blackmar, Newkirk & Eager were on the brief) for Jewell-La Salle Realty Company.

Before Booth and Gardner, Circuit Judges, and Sanborn, District Judge

[fol. 2] The United States Circuit Court of Appeals for the Eighth Circuit hereby certifies that records on appeals Nos. 8680, 8681, and 8689 having been submitted together and now pending before it, disclose the following:

## Statement of Facts

### Appeal No. 8680

In Appeal No. 8680 suit was brought in the United States District Court for the Western District of Missouri, by Gene Buck, as President of the American Society of Composers, Authors and Publishers, and De Sylva, Brown & Henderson, Inc., a corporation, Plaintiffs, vs. Wilson Duncan, operating Radio Station KWKC, and Jewell-La Salle Realty Company, a corporation, Defendants, for an injunction and damages for infringement of the copyright of a musical production. It was stipulated by the parties that the facts stated in the bill of complaint were true; and certain additional facts were also stipulated. From the bill and the stipulation the following facts have been gathered:

[fol. 3] I. The American Society of Composers, Authors and Publishers (hereinafter referred to for brevity's sake as the "Society"), is an unincorporated association organized and existing under and by virtue of the laws of the State of New York and has its principal place of business in the Southern District of New York. The membership of the Society exceeds 700, and is comprised of authors, composers and publishers of musical works. Said Society was organized and is now operating for the purpose of protecting the performing rights in musical works, copyrighted by its members respectively, against infringement because of the public performance thereof for profit.

Gene Buck is president of said Society. Because said membership is exceedingly numerous and it would be im-

practicable to join all the members of said Society as parties plaintiff, and the issues and questions involved here are of common and general interest to all of the members of the Society, the said Society has duly authorized and empowered the said Gene Buck as president thereof to institute and prosecute this suit in its behalf; and this suit is accordingly brought by plaintiff Gene Buck as president of The American Society of Composers, Authors and Publishers, for and on behalf of said Society.

II. The plaintiff De Sylva, Brown & Henderson, Inc. (hereinafter for brevity's sake called the "Publisher"), is a corporation organized under the laws of the State of New York, having its principal place of business in the Southern District of New York, and at all times hereinafter mentioned, was engaged in the business of printing, publishing and vending of copyrighted musical works.

III. The defendant Wilson Duncan is an individual and a resident of the Western District of Missouri; and defendant Jewell-La Salle Realty Company is a corporation organized and existing according to law, having an office and [fol. 4] its chief place of busines in the Western District of Missouri.

IV. At all of the times herein mentioned, defendant Jewell-La Salle Realty Company (hereinafter for convenience called the "Company"), owned and operated a certain hotel in Kansas City, Missouri, known as the La Salle Hotel, for the entertainment of its guests and the public generally. Said guests were guests for hire, and said hotel was operated as a commercial enterprise for profit. For the entertainment of the guests in said hotel, and of the public generally, and to promote the business of the Company, and to make said hotel an attractive and desirable place, and to attract trade and custom thereto, and in order that renditions of musical compos-tions might be heard in the hotel daily by the guests, the Company, among other instruments and devices, caused to be installed and maintains in said hotel a master radio receiving set, which receives and converts radio waves transmitted from radio broadcasting stations into sound. Said receiving set was equipped with wires leading therefrom to all parts of the

hotel, including the public rooms, parlors, and lobby, as well as into about two hundred private rooms. Loud speakers were attached to the wires leading from the receiving set, so that any musical composition picked up by said receiver could be and is simultaneously heard throughout the hotel.

V. At all of the times herein mentioned, defendant Wilson Duncan was the owner of and operated a certain radio station in Kansas City, Missouri, known and designated as KWKC. Said defendant was licensed by the Government of the United States to operate such radio station as a commercial station. Such license was issued to said defendant on an application filed by him with the department having jurisdiction, stating that said radio station was operated [fol. 5] and was to be operated for business and commercial purposes. Said defendant operated the station for profit and for hire, and received rent and income therefrom from persons engaging the facilities of the station, who desired their names or business to be mentioned over it, so that the same might be heard by the general public for the purpose of advertising such names or business. As a part of the business of said defendant and to make the station profitable to said defendant, and to attract others to engage the facilities of the station and pay therefor, said defendant caused musical compositions to be performed and rendered in and broadcast from the radio station. Such renditions and performances were public and were made available to the public, and were for the purposes of profit, both for said defendant and for others using the station or procuring their names or business to be mentioned over it.

VI. Prior to the 15th day of August, 1927, B. G. De Sylva, Lew Brown and Ray Henderson, citizens of the United States, created and wrote the words and lyrics of a new and original musical composition; and also prior to that date they composed and set original music to the words and lyrics, constituting a musical composition entitled, "Just Imagine."

VII. Prior to the 15th day of August, 1927, the authors and composers assigned such composition to the Publisher, including all rights therein and the right to secure copyright therein.

VIII. On the 15th day of August, 1927, the Publisher duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright 1927 by De Sylva, Brown and Henderson, Inc."

IX. After publication of such composition with such notices of copyright, the Publisher promptly on the 16th day of August, 1927, deposited in the office of the Register [fol. 6] of Copyrights, Washington, D. C., two complete copies of the best edition thereof then published, accompanied by a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work; and said work was duly registered by the said Register of Copyrights, who thereupon issued his certificate of copyright registration therefor as Class E, XXc., No. 670767.

X. Since August 15, 1927, such composition has been published by the Publisher; and upon each copy of such composition so published, there has been inscribed on the first page of the music the copyright notice required by law, in the words and figures set forth in paragraph VIII hereof.

XI. Prior to the 1st day of January, 1926, the Publisher, for a valuable consideration, by an instrument in writing, duly assigned, transferred, and set over to the Society the exclusive non-dramatic performing rights in and to any and all musical compositions, the copyright of which was then owned by the Publisher, for the term commencing January 1, 1926, and ending January 1, 1931, as well as the exclusive non-dramatic performing rights in and to any and all musical compositions to be thereafter acquired and copyrighted by the Publisher for such term.

XII. The Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in paragraph VI hereof, and all the rights secured under such copyright, except as to the rights assigned to the Society as set forth in paragraph XI. The Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in paragraph XI hereof, up to and including the 1st day of January, 1931, and by virtue of such assign-

ment the Publisher holds in trust for the Society the exclusive non-dramatic performing rights of said musical com-
[fol. 7] position secured by said copyright down to and including the 1st day of January, 1931.

XIII. Said composition has been used in connection with the manufacture of parts of instruments serving to reproduce mechanically said musical work, and the Publisher has filed a notice thereof, accompanied by the proper recording fee, in the office of the Register of Copyrights, and said notice is on file and is recorded therein, and the recording fee therefor has been paid to the Register of Copyrights.

XIV. On the 4th day of October and on the 7th day of October, 1928, and at other times prior and subsequent thereto, without the previous knowledge or consent of the Society or of the Publisher, and without subsequent ratification or consent of either the Society or the Publisher, and with full knowledge of said Society's rights in such work and of such copyright belonging to the Publisher, the defendant Duncan by means of his radio broadcasting station, gave and caused to be given public performances and renditions for profit of said musical composition; and the defendant Realty Company by means of its radio receiving set and other devices owned and controlled by it, enabled and caused its guests in the La Salle Hotel to hear said musical production so performed and rendered by said defendant Duncan by means of his radio broadcasting station.

XV. No pre-arrangement existed between the defendant Duncan and the defendant Company with respect to what music should be broadcasted by Duncan or received by the Company other than what might be said to be the usual pre-arrangement between any broadcaster and any person commercially operating a receiving set. The defendant Duncan operated his radio broadcasting station without any connection whatsoever with the Company. He selected his own
[fol. 8] programs and broadcasted them for the benefit of himself and whoever chose to tune in and receive them.

XVI. On May 29, 1928, there was addressed to said defendant Company by registered mail a letter, advising it generally of the terms of the Copyright Act. Enclosed therewith was a list of the members of the American Society of Composers, Authors, and Publishers. The name of the

plaintiff De Sylva, Brown & Henderson, Inc., was included in said list of members. Defendant Company was informed that unless and until license was obtained from said American Society it should strictly avoid the rendition or performance in its hotel of any musical compositions copyrighted by any member of said Society, under any circumstances.

An order pro confesso for failure to answer was entered against the defendant Duncan; later, a final decree was entered granting an injunction and damages against him, and dismissing the bill as to defendant Jewell-La Salle Realty Company for lack of equity.

The contention of appellant is that the Jewell-La Salle Realty Company, through the use of its receiving set and loud speakers on the dates above mentioned gave a public performance for profit of the musical composition in question within the meaning of 17 USC Sec. 1 (e).

The contentions of the appellee are (a) that the Jewell-La Salle Realty Company was not a performer within the meaning of the statute cited; (b) that the alleged performance in the hotel was not "for profit" within the meaning of those words as used in the statute.

## Question Certified

This court, being in doubt, desires the instruction of the Supreme Court upon the following question, a decision of which is deemed indispensable to a determination of appeal No. 8680 now before it, and to a proper discharge [fol. 9] of its duties therein:

Question I. Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC Sec. 1 (e)?

Wilbur C. Booth, United States Circuit Judge. Archibald K. Gardner, United States Circuit Judge. John B. Sanborn, United States District Judge.

[fol. 10] STATEMENT OF FACTS

Appeals Nos. 8681 and 8689

These appeals grow out of one suit which involved in its first count a state of facts similar to those in No. 8680, except that the hotel company alone was made defendant. The seventh count differed from the first count in this: that the infringement alleged was that the hotel company by means of an orchestra caused the production in the hotel of a musical composition protected by a copyright,—the rights under which were owned by plaintiffs,—no consent to such production having been obtained by defendant. There was no proof of actual damages. The decree dismissed the first count for lack of equity; but awarded damages to plaintiff on the seventh count in the sum of $250.

The plaintiffs have appealed (No. 8681) from that part of the decree which dismissed the first count. The defendant has appealed (No. 8689) from that part of the decree which awarded damages on the seventh count.

The contentions of the parties in appeal No. 8681 are the same as in appeal No. 8680.

The contention of the appellant in appeal No. 8689 is that the court adopted the wrong statutory measure of damages; that instead of adopting the amount in the "no other case" clause of Section 25(b) of the Act of March 4, 1909 (35 Stat. 1081, Chap. 320) as amended (37 Stat. 489) [17 U. S. C. Sec. 25], it should have adopted the amount fixed by Section 25(b) Fourth.

QUESTIONS CERTIFIED

This court, being in doubt, desires the instruction of the Supreme Court upon the following questions, a decision of which is deemed indispensable to a determination of the appeals in Nos. 8681 and 8689 now before it, and to a proper discharge of its duties therein:

Question I. Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel [fol. 11] and under his control and for the entertainment

of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such musical composition within the meaning of 17 U. S. C. Sec. 1(e)?

Question II. In a case disclosing infringement of a copyright covering a musical composition, there being no proof of actual damages, is the court bound by the minimum amount of $250 set out in the so-called "no other case" clause of Section 25(b) of the Copyright Act (17 U. S. C. Sec. 25), reading, "and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty?"

Question III. Is Section 25(*b*) Fourth of the Copyright Act (17 U. S. C. Sec. 25) applicable, in the discretion of the court, to a case disclosing infringement of copyright covering a musical composition, there being no proof of actual damage?

Question IV. In Section 25(b) of the Copyright Act (17 U. S. C. Sec. 25) is the clause reading, "nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant," confined in its scope to the particular cases of infringement theretofore specifically mentioned in said Section 25(b)?

Wilbur C. Booth, United States Circuit Judge. Archibald K. Gardner, United States Circuit Judge. John B. Sanborn, United States District Judge.

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[fol. 12] Clerk's certificate to foregoing certificates omitted in printing.

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[Endorsed:] U. S. Court of Appeals, Eighth Circuit. No. 8680. Gene Buck et al., vs. Appellants, Jewell-La Salle Realty Co. No. 8681. Gene Buck et al., vs. Appellants, Jewell-La Salle Realty Co. No. 8689. Jewell-La Salle Realty Co., vs. Appellant, Gene Buck et al. Certificates of questions to Supreme Court U. S.

Endorsed on cover: File No. 35,052, 35,053, 35,054. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 921. Gene Buck, as President of the American Society of Composers, Authors and Publishers, and De Sylva, Brown & Henderson, Inc., a corporation, vs. Jewell-La Salle Realty Company, a corporation. (Certificate). Term No. 922. Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a corporation, vs. Jewell-La Salle Realty Company, a corporation. Term No. 923. Jewell-La Salle Realty Company, a corporation, vs. Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Leo Feist, Inc., a corporation. Filed May 22, 1930. File. No. 35,052, 35,053, 35,054.

FILE COPY

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CHARLES ELMORE C

IN THE

# Supreme Court of the United States

**October Term, 1930.**

**Nos. 138 and 139.**

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and DE SYLVA, BROWN & HENDERSON, INC., a corporation,
*Appellants,*

*vs.*

JEWELL-LASALLE REALTY COMPANY, a corporation,
*Appellee.*

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF FOR APPELLANTS.

THOMAS G. HAIGHT,
NATHAN BURKAN,
LOUIS D. FROHLICH,
E. S. HARTMAN,
MAURICE J. O'SULLIVAN,
*Counsel for Appellants.*

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*vs.*

JEWELL-LASALLE REALTY COMPANY, a corporation,

*Appellee.*

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF FOR APPELLANTS.

### Opinions of the Court Below.

As these cases are here on certificate from the Circuit Court of Appeals for the Eighth Circuit, there is no opinion of that Court. The opinion of the District Court is reported in 32 Fed. (2) 366.

### Jurisdiction.

The Circuit Court of Appeals for the Eighth Circuit has certified to this Court a question or proposition of law pursuant to Section 239 of the Judicial Code as amended by the Act of February 13, 1925.*

*U. S. Code, Title 28, Sec. 346.

IN THE

# Supreme Court of the United States

October Term, 1930.
Nos. 138 and 139.

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### Opinions of the Court Below.

As these cases are here on certificate from the Circuit Court of Appeals for the Eighth Circuit, there is no opinion of that Court. The opinion of the District Court is reported in 32 Fed. (2) 366.

### Jurisdiction.

The Circuit Court of Appeals for the Eighth Circuit has certified to this Court a question or proposition of law pursuant to Section 239 of the Judicial Code as amended by the Act of February 13, 1925.*

*U. S. Code, Title 28, Sec. 346.

## Statement of the Case.

One of these actions (No. 138) was brought by appellants against Wilson Duncan, operating a radio broadcasting station in Kansas City, Missouri, and Jewell-LaSalle Realty Company, the appellee in the Court below, conducting the LaSalle Hotel at the same place.[1] The other action (No. 139) was brought against the Jewell-LaSalle Company alone. Both suits were instituted in the United States District Court for the Western District of Missouri, and are based on alleged infringements of copyrighted musical compositions. The copyrights are owned by one of the plaintiffs, and the other plaintiff has the exclusive non-dramatic performing rights thereunder.[2] An injunction and damages are sought.[3] The cases were submitted to the District Court on an agreed state of facts, which may be briefly summarized as follows:

The defendant Duncan owned and operated a radio broadcasting station in Kansas City. This station was admittedly operated for purposes of profit; Duncan receiving rent and income from persons engaging the facilities of the station.[4]

Defendant, Jewell-LaSalle Realty Company, owned and operated the LaSalle Hotel likewise for profit. For the convenience and entertainment of its guests and the public generally, and to promote its business through making the hotel an attractive and desirable place for the public to patronize and to attract trade and custom thereto, the LaSalle Company gave and caused to be given in its hotel daily performances or renditions of musical compositions.

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[1] The appellants in the Court below will hereinafter be referred to as the plaintiffs and the appellee as the defendant or "the LaSalle Company".

[2] Cert. pp. 2-3.

[3] Cert. p. 2.

[4] Cert. p. 4.

For such purpose, among other instruments and devices, it installed and maintained in the hotel a large and powerful master radio receiving set, which was at all times under the direct control of, and operated by, the LaSalle Company, and "which received and converted radio waves transmitted from radio broadcasting stations into sound".[5] The receiving set was equipped with wires leading therefrom to all parts of the hotel, including the public rooms, parlor and lobby, as well as about 200 private rooms. Loud speakers were attached to wires leading from the radio receiving set, so that any broadcasted musical composition picked up by the receiver was simultaneously heard throughout the hotel.[6]

On certain dates, without the consent or license of plaintiff, Duncan broadcast from his radio station, the copyrighted musical compositions in question. By means of its beforementioned radio receiving set, loud speakers, and other devices owned and controlled by it, the LaSalle Company picked up the radio waves so broadcast by Duncan, converted them into sound in the manner hereinafter set forth, and thus "enabled and caused its guests in the LaSalle Hotel to hear said musical production so performed and rendered" by Duncan.[7] No pre-arrangement existed between Duncan and the LaSalle Company with respect to what music should be broadcast by the former or picked up by the latter. Duncan operated his radio broadcasting station without any connection with the LaSalle Company, selected his own programs, and broadcast them for the benefit of himself and whoever chose to tune in and receive them.[8]

Prior to the dates just mentioned, there had been sent to the LaSalle Company, by registered mail, a letter advis-

[5] Cert. p. 3.
[6] Cert. pp. 3-4.
[7] Cert. p. 6.
[8] Cert. p. 6.

ing it generally of the terms of the Copyright Act and that unless a license was obtained from plaintiff, American Society of Composers, Authors and Publishers, it should strictly avoid the rendition or performance under any circumstances, in its hotel, of any musical composition copyrighted by any member of said Society. The name of De Sylva, Brown & Henderson, Inc., the other plaintiff, was included in the list of members of the Society which was enclosed with such notice.[9]

It was, and is, the plaintiff's contention that each defendant had separately given a public performance for profit of the copyrighted musical compositions, within the meaning of Section 1 (e) of the Copyright Act,[10] to be hereinafter quoted, and had consequently infringed the plaintiffs' copyright.

In the first suit,[11] a decree *pro confesso* was entered against defendant Duncan, for failure to answer, and later a final decree was awarded granting an injunction and damages against him. The District Court, however, denied any relief against the LaSalle Company and dismissed the bill as to it, holding that what it had done did not constitute a *"performance"* within the meaning of the Copyright Act, and hence that the company had not infringed the copyright.[12]

In the second suit,[13] the bill was likewise dismissed as to the count which alleged an infringement based on facts similar to those just recited. There was, however, another count in that suit in which the infringement asserted was the rendition of a copyrighted musical composition by an

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[9] Cert. pp. 6-7.
[10] U. S. Code, Title 17, p. 4, Sec. 1 (e).
[11] No. 138.
[12] Cert. p. 7; 32 Fed. (2d) 366.
[13] No. 139.

*orchestra* in the hotel. The latter count was sustained, and an injunction and damages were awarded to the plaintiff.[14]

From the decrees dismissing the bill, plaintiff appealed to the Circuit Court of Appeals for the Eighth Circuit. The LaSalle Company appealed from so much of the decree in the second suit as awarded damages against it. The Circuit Court of Appeals, after argument, certified to this Court the one question which is common to both suits, and three questions which arise only in the second case. As these latter arise on the defendant's appeal, they will not be discussed in this brief but in the brief to be filed in answer to the defendant's brief on its appeal.[15]

## Question Certified.

> "Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC Sec. 1 (e)?"[16]

The Circuit Court of Appeals evidently considered that if the question were answered in the affirmative, that the performances were both *public* and for *profit*, and, in that event, that LaSalle Company had infringed. Consequently, whether or not they were "public" and "for profit" will not be discussed in this brief.

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[14] Cert. p. 8.
[15] No. 140.
[16] Cert. p. 7.

## SUMMARY OF ARGUMENT.

1. The question involved in these cases does not affect owners of private radio receiving sets used in their own homes. Even if they could be said to be giving a performance within the meaning of the Copyright Act, when they invite their friends to hear a musical composition which is being broadcast, they would not be guilty of infringement, because an unlicensed performance of a copyrighted musical composition is not an infringement unless it is both public and for profit.

2. The Courts have uniformly given to the words "public performance for profit" and "perform publicly for profit", in Section 1 (e) of the Copyright Act a broad and liberal interpretation, and have applied them so as to protect the copyright proprietor as each new condition has arisen. They have brushed aside all of the sophistries which have been indulged in by those who have wished, for purposes of profit, to avail themselves of the copyrighted musical genius of others without paying therefor. If the rendition of the copyrighted composition has been for the profit of the person who makes it available to any part of the public, it has been consistently held that such a person infringes the Copyright Act, irrespective of whether the profit is indirect and irrespective of the means employed to bring the musical composition to the ears of the public.

3. The fact that radio broadcasting and reception as now practised was unknown at the time of the passage of the Copyright Act in 1909 does not affect the construction to be given to the words "public performance for profit" and "perform publicly for profit", in Sec. 1 (e) of the Act. This proposition has received the express approval of the Circuit Court of Appeals for the 6th Circuit, and is in harmony with all other relevant decisions.

**4. In the light of the before stated liberal and progressive interpretation given by the courts to copyright statutes, the LaSalle Company, through the use of its radio receiving set and loud speakers, gave performances in its hotel within the meaning of Sec. 1 (e) of the Copyright Act, just the same as if it had employed an orchestra to render the copyrighted compositions therein. A contrary view would fail to recognize the substance and reality of the matter, as well as the purpose of the Act. Reason and the weight of such authorities as there are support this proposition. The decision of the District Court is based upon incorrect reasoning and is out of harmony with the liberal construction which the courts have given to the Copyright Act. Consequently, the question certified should be answered in the affirmative.**

## ARGUMENT.

As the question certified calls for a construction of Sec. 1 (e) of the Copyright Act, we shall preface the discussion of the precise question with a brief statement of the limitations of that Section, and the character of the interpretation which has heretofore been given to it by the courts, and also with a consideration of what effect, if any, the fact that broadcasting as now practised was unknown at the time of the passage of the Copyright Act in 1909, has upon the construction of the Act.

## I.

## THE QUESTION INVOLVED IN THESE CASES DOES NOT AFFECT OWNERS OF PRIVATE RADIO RECEIVING SETS USED IN THEIR OWN HOMES.

At the outset, we desire to make it clear that the owner of a private radio receiving set, used in his own home, could not, under any circumstances, be liable for the infringement of copyrighted music broadcast from a radio transmitting station, even if he could be said to be giving a performance within the meaning of the Copyright Act, when he invites his friends to hear a musical composition which is being broadcast. This is so, because under the express terms of the Copyright Act, unless the performance of a copyrighted musical composition is both *public* and for *profit*, there is no infringement of the copyright. The performance by a private radio receiving set in a home would be neither public nor for profit.

*The Copyright Act*,[17] provides:

> "Section 1. That any person entitled thereto, upon complying with the provisions of this title, shall have the *exclusive right*:
>
> * * * * * * * *
>
> "(e) *To perform the copyrighted work publicly for profit if it be a musical composition* and for the purpose of *public performance for profit.*"

It is upon the violation of the exclusive right of the copyright proprietor to *publicly* perform the copyrighted musical composition for *profit* that these actions are based.

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[17] Title 17, U. S. Code, p. 4.

## II.

### THE COURTS HAVE UNIFORMLY GIVEN TO THE WORDS "PUBLIC PERFORMANCE FOR PROFIT" AND "PERFORM PUBLICLY FOR PROFIT" IN SECTION 1 (E) OF THE COPYRIGHT ACT A BROAD AND LIBERAL INTERPRETATION, AND HAVE APPLIED THEM SO AS TO PROTECT THE COPYRIGHT PROPRIETOR AS EACH NEW CONDITION HAS ARISEN.

In *Herbert* v. *Shanley Co.*, (229 Fed. 340) and *John Church Co.* v. *Hilliard Hotel Co.*, (221 Fed. 229), the Circuit Court of Appeals for the Second Circuit held that the rendition of a copyrighted musical composition by a hotel orchestra and by professional singers accompanied by an orchestra, respectively, where no separate charge was made for the music, did not constitute a public performance for profit within the meaning of the Act. These decisions, however, were *reversed* by this Court (242 U. S. 591), Justice HOLMES saying:

> "If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. * * * *It is enough to say that there is no need to construe the statute so narrowly.*"

The effort of moving picture theatre proprietors to escape the charge of infringement when *parts* of copyrighted musical compositions were played by orchestras, organs or other musical instruments during the showing of moving pictures, and where no separate charge was made for the music, was met by adverse decisions in the United States District Court for the Eastern District of Pennsylvania (*Harms* v. *Cohen*, 279 Fed. 276) and in the Circuit Court of Appeals for the Fifth Circuit (*Pastime Amusement Co.* v. *M. Witmark & Sons*, 2 Fed. (2d) 1020, affirming 298 Fed. 470), as well as in a number of other courts whose decisions have not been reported.

Nor have the courts made any distinction between cases where the performance is by a musician and those where it is by a phonograph record or perforated music roll upon a player piano. *M. Witmark & Sons* v. *Calloway*, 22 Fed. (2d) 412 (D. C. E. D. Tenn.); *Buck* v. *Lester*, 24 Fed. (2d) 877 (D. C. E. D. S. C.); *Buck* v. *Heretis*, 24 Fed. (2d) 876 (D. C. E. D. S. C.); *Berlin* v. *Daigle*, 31 Fed. (2d) 832 (C. C. A. 5th Cir.); *Lutz* v. *Buck*, 40 Fed. (2d) 501 (C. C. A. 5th Cir.); certiorari denied October 20, 1930.

Likewise, it has now been established by many decisions in this country and abroad that the broadcasting by radio of the rendition of a copyrighted musical composition constitutes an infringement of the copyright, and *a certiorari to review a decision so holding has been denied by this Court. M. Witmark & Sons* v. *Bamberger*, 291 Fed. 776 (D. C. N. J.); *Remick* v. *General Electric Co.*, 4 Fed. (2d) 160 (D. C. S. D. N. Y.); *Remick* v. *American Automobile Accessories Co.*, 5 Fed. (2d) 411 (C. C. A., 6th Cir., reversing the District Court for the Southern District of Ohio); *certiorari denied*, 269 U. S. 556; *Remick* v. *General Electric Company*, 16 Fed. (2d) 829 (D. C. S. D. N. Y.), *Messager* v. *British Broadcasting Company, Ltd.*, 137 L. T. Rep., 810 (1927); 2 K. B. 543; (King's Bench Division of the English High Court of Justice); same case on appeal, Law Rep. (1928), 1 K. B. 660, (Court of Appeal); 140 L. T. Rep. 227 (1929) (House of Lords); *Chappell & Co., Ltd.* v. *Associated Radio Co. of Australia*, 50 Victorian Law Rep., 350 (1925), (Supreme Court of Victoria).

As the reports in which the opinions in *Messager* v. *British Broadcasting Company, supra*, appear, may not be readily available, we will, for the convenience of the Court, analyze that case and quote from the opinions. There one of the questions was whether the radio broadcasting of a comic opera constituted an infringement of the musical copyright in the opera. The answer was

held by Mr. Justice McCardie in the King's Bench Division to depend upon whether or not, in so broadcasting the opera, defendants had given "a performance in public." A performance as defined in the English Copyright Act is:

> "Any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument."

In discussing whether the defendants had given a public performance, Justice McCardie said:

> "It was by electrical instruments that the defendants by modulating waves in the aether were able to affect, as they intended to affect, a vast number of electrical instruments possessed by members of the public, and to thereby render audible to that public the performance given within the walls of the defendants' studio. In my view, however, the defendants in doing what they did clearly gave a 'public performance.' Instead of gathering the public into a vast assembly room, they set in motion certain aether waves knowing that millions of receiving instruments in houses and flats were tuned to the waves sent forth, and knowing and intending also that acoustic representation of the opera would thereby be given to an enormous number of listeners. If I did not hold this to be a 'public performance' by the defendants I should *fail to recognize the substance and reality of the matter and the object and intent of the Copyright Act.*"

He also said:

> "Although wireless telephony may not be wholly 'mechanical' in the *narrow* sense of that word, yet I think that the Copyright Act extends to that which though not definitely in the contemplation of those who framed the Act, yet falls substantially within the *wide and embracing words* employed in the defining clauses."

In the Court of Appeals, Justice McCardie's ultimate conclusion in the case was reversed because of his construction of a contract, but his holding that the broadcasting of a musical composition was a *public performance* in violation of the copyright was approved. Lord Justice Scrutton, who delivered one of the opinions in that Court, in referring to the defendant's contentions, said:

> "Secondly, in the Court below they said (and I admire their courage in saying it) that though they were giving a performance with mechanical adjuncts, which enabled that performance to be heard by hundreds of thousands of people, it was not a public performance. As I say, I admire their courage in saying it. Mr. Justice McCardie, who tried the case, found, *as one would expect*, that it was a public performance;" * * *

Then, after referring to the decision which Mr. Justice McCardie had reached in respect to the contract, he said:

> "Thereupon the British Broadcasting Company appealed to this Court, but in this Court *their courage failed them, and very properly*, if I may say so, *they have not argued that intentionally to talk to 100,000 people is not a public performance.*"

Lord Justice Atkin, who also delivered an opinion, said:

> "It is of some importance to remember that this Court, in reversing the decision of the Court below, is not deciding that broadcasting is not a public performance. It is in fact *acceding* to that position."

In the House of Lords, the question is not discussed in any of the opinions, doubtless because the defendant's contention that broadcasting was not a public performance was abandoned there, as it was in the Court of Appeal.

It is stated in *Chappell & Co., Ltd.*, v. *Associated Radio Co., supra*, that the Copyright Act of Australia is, so far as

the question under consideration is concerned, the same as the British Copyright Act. The opinion in this case contains a good description of broadcasting and radio reception. Consequently, for the convenience of the Court, we have quoted that part in an appendix.

It is, therefore, apparent that the courts of this country have given to the words "public performance for profit", found in Section 1 (e) of the Copyright Act, a broad and liberal construction, and have brushed aside all of the sophistries which have been indulged in by those who have wished, for purpose of profit, to avail themselves of the copyrighted musical genius of others without paying therefor. If the rendition has been for the profit of the person who makes it available to any part of the public, it has been consistently held that such a person infringes the copyright, irrespective of whether the profit is indirect, and irrespective of the means employed to bring the musical composition to the ears of the public. The decisions have been progressive and have met each new condition as it has arisen—first, the orchestra or cabaret in the restaurant, then the moving picture theatre, and, finally, the radio broadcaster. In the same way, this Court dealt, in *Kalem* v. *Harper Bros.*, 222 U. S. 55, with the contention that the making and sale for exhibition purposes of *moving pictures* of the incidents of a copyrighted book constituted an infringement of the copyright proprietor's right to *dramatize* his work.

See also *Ford* v. *Blaney*, 148 Fed. 642, 644; *Harper Bros.* v. *Donohue*, 144 Fed. 491, 496, where it was expressly stated that the Copyright Act should be liberally and broadly construed.

As before shown, the same broad and liberal construction, so far as radio broadcasting is concerned, has been given to the British Copyright Act by the Courts of the British Empire.

## III.

**THE FACT THAT RADIO BROADCASTING AND RECEPTION AS NOW PRACTISED WAS UNKNOWN AT THE TIME OF THE PASSAGE OF THE COPYRIGHT ACT IN 1909 DOES NOT AFFECT THE CONSTRUCTION TO BE GIVEN TO THE WORDS "PUBLIC PERFORMANCE FOR PROFIT" AND "PERFORM PUBLICLY FOR PROFIT", IN SEC. 1 (E) OF THE ACT.**

This point is discussed because of the defendant's contention in the Court below that because the "general use of radio as a practical means of communication postdates the last amendment" to the Copyright Act (1913), Congress did not have radio broadcasting and reception in mind at the time of the passage of the Act, and, consequently, the Act should not be construed to cover the same, "unless it is clearly made to appear that it is necessarily within the spirit of the Act." This precise question was considered by the Circuit Court of Appeals for the 6th Circuit in *Remick* v. *American Automobile Accessories Co., supra,*[18] in which, as before stated, a *certiorari was denied by this Court.* On that point, Judge MACK said:

> "While the fact that radio was not developed at the time the Copyright Act was enacted may raise some question as to whether it properly comes within the purview of the statute, it is not by that fact alone excluded from the statute. In other words, the statute may be applied to new situations not anticipated by Congress, if, fairly construed, such situations come within its intent and meaning. Thus it has been held both in this country and England that a photograph was a copy or infringement of a copyrighted engraving under statutes passed before the photographic process had been developed. *Gambart* v. *Hald.*, 14 C. B. (N. S.), 303; *Rossiter* v. *Hall,* 5

[18] 5 Fed. (2d) 411.

Blatchford, 362. While statutes should not be stretched to apply to new situations not fairly within their scope, they should not be so narrowly construed as to permit their evasion because of changing habits due to new inventions and discoveries.

Bills have been introduced in both House and Senate to permit broadcasting without infringing copyrights. The rights of composer, producer, performer and the public under this new method of reproduction are eminently matters for considered legislation; but until Congress shall have specifically determined the relative rights of the parties, we can but decide whether and to what extent statutes covering the subject matter generally but enacted without anticipation of such radical changes in the method of reproduction are, fairly construed, applicable to the new situation."

This question was also considered and answered in the same way by the Supreme Court of Victoria in *Chappell & Co.; Ltd.*, v. *Associated Radio Co., supra,* [19] and by Justice McCardie in *Messager* v. *British Broadcasting Company, supra.*[20]

In *Kalem* v. *Harper, supra,*[21] the method of performing dramatic incidents of a story by motion pictures was unknown at the time of the passage of the Copyright Act, under which that suit was brought. Notwithstanding that, this Court held that motion pictures infringed the copyright owner's right to dramatize the story.

In *Gambart* v. *Hald,* cited by Judge Mack, Chief Justice Erle said that he could see no reason why the words of the statute should not be construed "according to their plain and ordinary meaning, and be held to apply to any mode of copying known at that time, and *to such other modes of*

[19] 50 Victoria Law Rep. 350 (1925).
[20] 137 L. T. Rep. 810 (1927); 2 K. B. 543.
[21] 222 U. S. 55.

*multiplying copies as the ingenuity of man may from time to time discover.*"

In *Edison* v. *Lubin*, 122 Fed. 240, the Circuit Court of Appeals for the 3rd Circuit said, at page 242:

> "To say that the continuous method by which this negative was secured was unknown when the act was passed, and therefore a photograph of it was not covered by the act, is to beg the question. Such construction is at variance with the object of the act, which was passed to further the constitutional grant of power 'to promote the progress of science and useful arts.' When Congress, in recognition of the photographic art, saw fit in 1865 to amend the act of 1831 (13 Stat. 540), and extend copyright protection to a photograph or negative, it is not to be presumed it thought such art could not progress, and that no protection was to be afforded such progress. It must have recognized there would be change and advance in making photographs, just as there has been in making books, printing chromos, and other subjects of copyright protection."

It can scarcely be said that making the rendition of a copyrighted musical composition publicly available, for profit, through the instrumentality of radio and its various mechanisms, is not as clearly within the scope and spirit of the Copyright Act as it would be to make it available by admitting the public to a room where the copyrighted musical composition is being rendered by an orchestra or other performer. In either case, the exclusive right which the Act confers upon the composer to publicly perform the composition for profit is invaded, *only the means employed are different.* The Act is not concerned with the *means,* but, as this Court held in *Kalem* v. *Harper, supra,* with the *result.*

IV.

**IN THE LIGHT OF THE BEFORE STATED LIBERAL AND PROGRESSIVE INTERPRETATION GIVEN BY THE COURTS TO COPYRIGHT STATUTES, THE LASALLE COMPANY, THROUGH THE USE OF ITS RADIO RECEIVING SET AND LOUD SPEAKERS, GAVE PERFORMANCES IN ITS HOTEL WITHIN THE MEANING OF SEC. 1 (e) OF THE COPYRIGHT ACT, JUST THE SAME AS IF IT HAD EMPLOYED AN ORCHESTRA TO RENDER THE COPYRIGHTED COMPOSITIONS THEREIN. A CONTRARY VIEW WOULD FAIL TO RECOGNIZE THE SUBSTANCE AND REALITY OF THE MATTER, AS WELL AS THE PURPOSE OF THE ACT. CONSEQUENTLY, THE QUESTION CERTIFIED SHOULD BE ANSWERED IN THE AFFIRMATIVE.**

In discussing this proposition, we shall first refer to such authorities as have dealt with the questions raised by it, then to the considerations which we think must lead to the conclusion that the proposition is sound, and finally to what we think are the fallacies in the reasoning of Judge Otis in the District Court, as we presume this Court will consider his opinion.

1. There are no cases, so far as we are aware, except the case at bar where the precise question before this Court has been passed upon. However, the proposition for which we contend has received judicial sanction as well as the approval of a leading writer on the law of copyright. On the other hand, it seems to be opposed to the dicta of a District Judge in the Southern District of California, in a case decided after the decision was rendered in the case at bar.[22]

In *Messager* v. *The British Broadcasting Co., Ltd., supra,*[23] Mr. Justice McCardie, in approaching the solution of the question as to whether broadcasting constituted an infringement of copyright, said:

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[22] *Buck* v. *De Baum,* 40 Fed. (2d) 734.
[23] 137 L. T. Rep. 810 (1927); 2 K. B. 543.

> "It is, I think, reasonably clear that a person *who gives to a public audience a performance made audible and effective to them by means of a receiving instrument in the place* where that public is assembled together may be liable for infringement of copyright."

Mr. Copinger, one of the best known textbook writers on copyrights, in his work on "The Law of Copyright" (which was published in 1927, before Justice McCardie's decision was handed down), after quoting the definition of performance as contained in the English Copyright Act, said (p. 154):

> "It seems fairly clear therefore that a person *who renders a performance audible by means of a receiving instrument performs the work*, and if such performance is 'in public' it will be an infringment of copyright."

Although Judge Thacher, in *Remick* v. *General Electric Company, supra,** was dealing with a radio broadcaster, his reasoning fully supports the proposition for which we contend in the case at bar. He held that one "who, by means of the microphone 'picks up' another's unauthorized performance of a copyrighted musical composition and transmits it by radio from a broadcasting station maintained and operated to stimulate the sale of radio products", infringes the copyright. He said that the only distinction between that case and *Remick* v. *American Automobile Accessories Co., supra,* was that the defendant in the former "did not participate in the rendition of the musical production except by affording to others the opportunity to hear it." In the case before Judge Thacher, the musical composition was performed, in the first instance, by an orchestra in the ball-

*16 Fed. (2) 829.

room of a hotel. It was "picked up" by a microphone and broadcast through defendant's station.

It is difficult to perceive any real distinction, so far as infringement of a copyright is concerned, between a radio broadcaster who "picks up" and broadcasts from his transmitting station an unauthorized performance of a copyrighted musical composition, and a hotel proprietor who "picks up" by his receiving set such a performance which has been broadcast, and, through his loud speaker, rebroadcasts it in his hotel and thus makes it available to his patrons there assembled.

Judge McCormick in the Southern District of California, held, in *Buck* v. *DeBaum*, 40 Fed. (2d) 734, that a cafe proprietor who "picked up" on a radio receiving set in his cafe and made available to the patrons thereof, a copyrighted musical composition which had been broadcast from a commercial station, *which station had been licensed to broadcast the composition*, did not infringe the copyright. His decision was based on the theory that the copyright proprietor, by licensing the broadcasting station, "impliedly sanctioned and consented to any 'pick-up' out of the air that was possible in radio reception." *In the case at bar, the broadcaster was not licensed*, and, consequently, we presume that this Court will not be willing to pass upon the effect, if any, that a license granted to a broadcaster may have on the right of one situated as is the defendant.[24] Therefore, we shall not attempt to argue the question in this brief. It will be sufficient, we think, to merely point out that there is a vast difference between implying a license to "pick out of the air" a musical composition which a broadcaster has been licensed to *broadcast* and implying a further license to *perform for profit* what has thus been

[24] *Strattons Independence* v. *Howbert*, 231 U. S. 399, 422.

"picked out". The Court in that case declined to recognize this distinction. In the course of Judge McCormick's opinion, he expressed the view that,

> "One who manually or by human agency merely actuates electrical instrumentalities whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the copyright law."

This was of course *dictum,* as the decision was rested on an implied license.

The reasons given by him for this conclusion will be discussed hereafter when we deal with the opinion of Judge Otis, as they are some of the reasons given by Judge Otis, and doubtless were influenced by his decision. Judge McCormick stated in his opinion that Judge Otis' decision was an authority in Judge McCormick's suit on "the meaning to be given to the word 'perform' in the Copyright Act."

An appeal has been taken from Judge McCormick's decision, but the argument has been held in abeyance awaiting the final disposition of the case at bar.

2. It is clear from the decisions cited under Point II that any *rendition* of a musical composition, whether by a musician or mechanical means, constitutes a *performance* thereof.

In approaching a solution of the question as to whether the appellee gave, or caused to be given, a *performance* in the Hotel LaSalle, it is important not to lose sight of the manner in which radio operates, or at least how sound at one point is made audible through radio at a distant point. Considering the important part that radio plays in our everyday life and the extent to which it has been described

by the Courts,[25] we presume that the Court will take judicial notice of one or both of these matters. In *People* v. *Congress Radio, Inc.*, 133 Misc. (N. Y.) (Affd. 226 A. D.; 234 N. Y. Supp. 860) it was said:

> "A radio receiver is an instrument of such general and well-known use that I believe the *court is justified in taking judicial notice* of the fact that a radio receiver is a stationary instrument for *reproducing sound transmitted on an electrical wave* from a radio broadcasting station and intercepted by the radio receiver or a radio receiver and antenna, retransmitting the sound through ear phones or through the medium of a *loud speaker, a device used in connection with the radio for the purpose of making the sound audible throughout a larger field than that achieved by the use of the ear phones.* The radio receiver is usually composed of vacuum tubes containing special elements, and of other instruments referred to as inductances, capacities and resistances, and devices for their control, so wired and arranged to receive the electrical charges necessary for operation."

Without regard to close technical details, radio may be described as follows:[26]

One speaking into the microphone varies or modulates an electric current in accordance with the vibrations (pro-

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[25] See *Marconi Wireless* v. *DeForest Radio*, 236 Fed. 942, 944, (D. C. S. D. N. Y.); *Radio Corp.* v. *Splitdorf Electrical Co.*, 14 Fed. (2d) 643, 644, (D. C. N. J.); *Radio Corp.* v. *Twentieth Century Radio Corp.*, 19 Fed. (2d) 290, 291 (C. C. A., 2nd Cir.), an excellent description; *Westinghouse E. & M.* v. *DeForest Radio*, 21 Fed. (2d) 918, 919 (C. C. A., 3rd Cir.); *Fada Radio, Ltd.* v. *Canadian General Electric Co., Ltd.*, Canada Law Reports (1928), p. 239 (Supreme Court of Canada); *Chappell & Co., Ltd.*, v. *Associated Radio Co., supra*, 50 Victoria Law Reports 350 (1925) (Australia). Extracts from the last two cited cases are, for convenience of the Court, quoted in an Appendix.

[26] See descriptions in the cases cited under footnote 23; also "The Principles Underlying Radio Communication"—Radio Communication Pamphlet No. 40, prepared by the Bureau of Standards for the Signal Corps of the U. S. Army—Government Printing Office, 1922.

duced by the voice) of the microphone. The variation of this electric current correspondingly varies an oscillating current or electro-magnetic wave that is continuously generated by and radiated from the transmitting station. The current transmitted is known as "oscillating current", which oscillates at a frequency of twenty thousand to one million cycles or more per second. These oscillating currents radiated from the transmitting station are referred to as radio frequency currents or radio waves. They are picked up at the receiving station by the antenna wire or aerial and flow directly into the ground. In doing so, however, they pass through a coil or some similar instrumentality associated with the receiving set (which is independently supplied with an electric current) and if the receiving set is tuned or adjusted to the frequency of oscillations of the waves being transmitted, the passage of the radio waves through the aerial or antenna wire to ground sets up or induces currents in the radio receiving set. These currents, even though modulated or altered in accordance with speech, cannot be utilized in their then form to directly reproduce the original sound. A detector in the receiving set, usually a tube, is utilized to change the characteristics of the modulated radio frequency currents set up in the receiving apparatus into a current of low enough frequency to actuate a reproducer, such as a telephone receiver or loud speaker, and cause its diaphragm to vibrate in the same way that the diaphragm of the microphone vibrated, and generate sound waves audible to the ear. The currents after they have been changed in characteristic by the detector and are usable for operation on audible apparatus are said to be audio frequency currents. These audio frequency currents are amplified (by other tubes in the receiving set) so as to give more volume and strength before they finally actuate the audible apparatus. It will be seen, there-

fore, that *no sound* is carried by the so-called radio waves, but the receiving set and loud speaker *reproduce or re-create* the original sound waves. The cycle is (1) sound waves (at audio frequency) varying an electric current (at audio frequency), which currents in turn (2) alter, modify or modulate high frequency currents (radio frequency) so that radio waves (at radio frequency) (3) radiate from the aerial of the transmitting station, (4) pass through the aerial of the receiving station, (5) induce or set up the modulated high frequency currents (at radio frequency) in the receiving set, where their character is (6) changed by the detector to low frequency currents (at audio frequency) which in turn (7) cause the diaphragm of a sound producing device, such as a loud speaker, to vibrate (at audio frequency) and (8) set up sound waves in accordance with its vibrations.

It must be continually borne in mind, therefore, that the guests and patrons of the hotel did not hear the *original* rendition of the musical composition, and, indeed, *that it was not carried through space*, but that they heard a *reproduction* thereof; that this reproduction was brought about by the acts of the appellee in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loud speakers; and that these things were done by the appellee for the entertainment of its guests and to attract patrons to the hotel. It must also be remembered that it is not the act of *reception* that constitutes the infringement—for that is not a performance—but the *further* and *separate* act of *re-broadcasting* the original performance through the loud speakers so as to make the performance available to the guests of the hotel.

It is difficult to see any difference in *substance* (and substance is what the Courts have dealt with in applying the Copyright Act) between a case where a hotel engages an

orchestra to furnish music for the entertainment of its guests and a case where, through the means of a radio receiving set and loud speakers, it furnishes the same music, from the same orchestra, for the same purposes. In the one case the orchestra would be in the hotel; in the other case in a broadcasting studio, but the *music is*, in each case, *made available to the patrons of the hotel by the act of the hotel proprietor and through instrumentalities under his control.*

There seems also to be no logical reason why, if the reproduction of a musical composition on a phonograph or perforated player piano roll, in a dance hall, restaurant or moving picture theatre, constitutes a public performance (as the cases before cited hold that it does), the act of reproducing or making audible an original performance through the use of a radio receiving set and loud speakers does not likewise constitute a performance. In the case of the phonograph, there has been an initial performance inaudible to those outside of the studio where it took place, but which has been impressed upon a bakelite disc. Through the instrumentality of the needle or stylus, and the sound box or loud speaker it is made audible to others and there is thus a re-performance of the musical composition. In the same way in radio, there has been an initial performance which is inaudible to those outside of the place where the initial performance took place, but which is made audible through the instrumentality of a receiving set and loud speakers. The only difference between the phonograph and the receiving set is in the *means* employed to effectuate the reproduction. But, manifestly, that feature is of no moment. The important consideration in each case is that by an *independent* act of his own, one makes available to others for his profit a performance of the copyrighted work

of another without paying the copyright proprietor therefor.

Again, there seems to be no difference in principle between the *broadcaster* who makes available, for the entertainment of others and for his own profit, the rendition of a copyrighted musical composition, and one who does the same thing for the same purpose but simply uses a different means of making the performance thus available. The broadcaster transmits through his transmitting apparatus; the appellee here transmits through its receiving apparatus and loud speakers.

If a performance of a copyrighted opera were broadcast, could it reasonably be said that the proprietor of a theater, to which admission was charged, who installed a receiving set and loud speaker therein, and re-broadcast to his patrons the performance which was being given in the opera house, would not be giving *a public performance for profit* within the meaning of Sec. 1 (e) of the Copyright Act? A negative answer to that question would seem to *disregard the realities of the situation* and recognize a fineness of distinction which has never characterized the construction of that Section by the Courts. Moreover, considering the facility with which speech and music can be broadcast and received, a negative answer would result in copyrighted musical compositions, to use the language of Mr. Justice Holmes in *Herbert* v. *Shanley Company, supra,** being "very imperfectly protected". The theatre proprietor in the supposed case is no different from the hotel proprietor in the case at bar. Again, unless plaintiff's position is upheld, an infringing broadcaster could transmit sound pictures by television and radio to the many thousand theatres in the United States, for the showing of which each theatre could

* 242 U. S. 591.

charge an admission fee, and the copyright owner would be without remedy, save perhaps to pursue a broadcaster who might be financially irresponsible, and who, in reality, did not give the performance in the theatre.

3. (*a*) It would seem that the underlying thought of the learned judge of the District Court and of the defendant in the Court below is that one in the position of appellee merely *listens* and does not perform, because "he has not created the music which he has heard." It is true, of course, that one who listens does not perform, but this analogy does not carry through to a case where one, by an instrumentality set up by himself, electrically energized by himself and controlled by him, makes a performance available to others. The broadcaster "has not created the music"; that has been done by the musician or musicians, but it has been made available to the thousands of listeners through the instrumentalities set up and controlled by the broadcaster. Neither has the person who inserts the record in the phonograph "created the music", but by the phonograph and his control of it, he has made it audible to all within the range of the instrument.

(*b*) In answering the contention of the plaintiffs that there was no difference between the phonograph and what the appellee did in this case the judge of the District Court said (R., p. 21):

> "The record on bakelite (the disc of the phonograph) is a separate and distinct thing from the original performance in the studio where the record was made. Playing that record is performing anew the musical composition imprinted upon it. The waves thrown out upon the ether are not a record of the original performance. They are the original performance. The *reception* is not a *reproduction* but a *hearing* of the original performance."

These differences seem to be without distinction and are of the character which the Courts have universally failed to recognize in construing the Copyright Act, as will appear from the cases cited under Point II of this brief.

In reading the above quoted remarks of Judge Otis, the inquiry naturally presents itself: Why was not the act of the LaSalle Company in making the original performance of the musical composition in the broadcasting studio audible to the guests and patrons of the Hotel LaSalle, the "performing anew" of the musical composition? The original rendition would not have been audible except for the instrumentalities employed by the appellee and its acts in controlling and actuating them. In one case, the composition has been imprinted upon the disc; in the other case, it has modulated an electric current. In both cases, the original performance would be inaudible to anyone outside of the studio where it took place except for the instrumentalities used—and so far as loud speakers are concerned, they are exactly the same—by the *independent* act of another. The "waves thrown out upon the ether" are not *sound* waves but modulated *electric currents* or electromagnetic waves which can be made to *create new* sound waves if a radio receiving set and loud speakers are used. They are thus not "the original performance" but they carry "a record of the original performance."

The original audition is not extended or diminished one whit by the broadcasting. It remains exactly the same as if it were not broadcast. As before stated, broadcasting simply transmits an electric current. The audition at the receiving set is a separate and distinct audition and is not the *same* as that which took place in the studio, *but is a reproduction thereof.* This is made more evident, because the audition at the receiving set may be louder to an infinite degree, or barely perceptible, and may be reproduc-

tion of remarkable fidelity, or with terrible distortion, depending on the operation and condition of the set. Could a distorted reception, full of howls and shrieks, be said to be the hearing of an original clear performance? It is not, but rather a poor *reproduction* of the original.

Or could it be said the vocal effort of a "whispering tenor", audible for a hundred feet at best, is the *same* as a radio reproduction thereof, on an open air public address system, where it can be made to be heard for miles?

Time signals are regularly broadcast from many broadcasting stations throughout the country. Listeners at a receiving set *instantaneously* compare their watches or clocks the very moment the time signal is heard. The time signal heard by the listener is an *instantaneous reproduction* of the signal given in the broadcasting station. It is not a "hearing" of the original time signal. This is made evident because we know sound travels at approximately 1100 feet per second, at ordinary temperature, yet watches are set from signals transmitted hundreds of miles away.

(*c*) Again, Judge Otis, with the same listening idea underlying his thoughts, asks the question: "If I throw open a window so that I can hear the music of a band passing by, am I producing that music?"

Judge McCormick, in *Buck* v. *DeBaum, supra,* expressed the same thought.

The same argument was advanced in the case decided by Judge Thacher, *supra.*[27] In answering it, he said:

> "It is not enough to say that the broadcaster merely opens the window, and the orchestra does the rest. On the contrary, the acts of the broadcaster are found in the reactions of his instruments, constantly animated and controlled by himself, and those acts are quite as continuous and infinitely more com-

[27] *Remick* v. *General Electric Co.,* 16 Fed. (2d) 829.

> plex than the playing of the selection by the members of the orchestra."

So, in the case at bar, "the acts" of the appellee are found in the "reaction of his instruments", "constantly animated and controlled by himself." These instruments picked up the radio waves set in motion by the transmitting apparatus, converted them into waves of audio frequency, and from electrical waves into sound and thus made audible to those within the range of the instruments.

(*d*) Judge Otis further said (R., p. 22):

> "The defendant had a right to have a radio in its hotel for the entertainment of its guests and to operate that radio. If while he was operating the same someone other than the defendant, wholly without the defendant's participation, put upon the ether and so threw into defendant's radio electrical impulses which came out of the radio as an audible rendition of a copyrighted musical composition, that was not in any sense the act of the defendant. The intent of the defendant did not enter into that act."

It is true that the LaSalle Company had a right to have a radio receiving set in its hotel. Whether it had a right to use it for the entertainment of its guests—and thus for its own profit—so far as copyrighted musical compositions are concerned, is the question in the case. Of course, those with radio receiving sets do not ordinarily control what the broadcaster transmits. They pick up whatever is being transmitted by the station to which they are tuned. Consequently, as the LaSalle Company *deliberately* tuned into a broadcasting station, it must be held to have *intentionally* reproduced for the entertainment of its guests whatever that broadcasting station was transmitting. There is no analogy, so far as intention is concerned, between what the appellee did in the case at bar and the supposititious case

suggested in the opinion of the District Court of a stranger surreptitiously placing a record of a copyrighted musical composition in a phonograph which the proprietor of a hotel had installed for the entertainment of his guests.

As was said by Judge HICKS in *M. Witmark & Sons* v. *Calloway, supra:*[28]

> "Assuming that the defendant did not intend to infringe, the lack of intention does not affect the fact of liability. *The result and not the intention* determines the question of infringement." (Citing cases.)

(*e*) Finally, Judge OTIS said:

> "If it was a performance of a musical composition it was a performance not by the defendant, but by the broadcaster on the defendant's instrument."

What we have before said demonstrates, we think, the fallacy of this statement. No performance, so far as the guests in the LaSalle Hotel were concerned, could have taken place except for the *intervening and separate act of the defendant.*

Judge MCCORMICK, in his opinion, said:

> "The performance, which is licensed as just stated occurs entirely in the studio of the broadcasting station where the copyrighted musical composition is lawfully used, and the action occurring at the receiving set is simultaneous therewith, and is in no sense a *reproduction* of the musical composition that is being lawfully performed at the broadcasting studio. The action, play, and use of the copyrighted composition has been completed within the studio."

As we have above shown, there must have been in the case before him, a *reproduction* as distinguished from an original rendition. Therefore, when he states that there was

[28] 22 Fed. (2d) 877.

not a *reproduction*, it indicates a lack of understanding on his part of the manner in which radio operates and how sound at one point becomes audible through radio at a distant point.

Again he says that the use of the composition had been completed within the studio, but he fails to note that it was again *used for profit* in the sense that it was *reproduced* by the cafe proprietor for the entertainment of his patrons. The same reasoning which Judge McCormick invokes, viz., that the use of the copyrighted composition had been completed within the studio, would apply to the broadcaster, but, as before stated, the courts of this country and abroad have held that a broadcaster "performs".

Thus, we think that we are justified in asserting that the decision of the learned judge of the Court below as well as the part of the opinion of Judge McCormick, which we have discussed, are not only based upon incorrect reasoning, but fail to recognize the substance and reality of the matter and are utterly out of harmony with the liberal construction which an unbroken line of decisions of this Court and various Circuit Courts of Appeals has given to the section in question of the Copyright Act.

**IT IS, THEREFORE, RESPECTFULLY SUBMITTED, THAT THE QUESTION CERTIFIED SHOULD BE ANSWERED IN THE AFFIRMATIVE.**

Respectfully submitted,

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## APPENDIX.

Between

Fada Radio, Limited,
(Defendant) Appellant,

and

Canadian General Electric Company, Limited,
(Plaintiff) Respondent.

LAMONT, *J.*,

"* * * The function of a transmitting apparatus is to generate high frequency continuous waves or sustained oscillations. Upon these are impressed by way of modulation a message. From the transmitting station these surging oscillations go out in all directions with the speed of light (186,000 miles per second) and in travelling past a receiving aerial they cause in its oscillations of the same frequency as those sent out by the transmitting station. The receiving aerial, however, has impinged upon it not only the oscillations from the transmitting station, from which reception is desired, but also the oscillations from every other transmitting station within range, then in operation. The signal desired may come from some far distant station and be relatively weak, while undesired signals may be coming at the same time from nearby or possibly more powerful stations and thus be relatively much stronger. To eliminate or screen out all signals from other transmitting stations and disturbances arising from natural causes so that the desired signal may be received and understood, is the function of a receiving set. Elimination of the undesired signals is secured by what is known in the art as 'selectivity'. The selectivity of a receiving set is the measure of its ability to exclude what is not wanted. Its ability to receive what is wanted at its greatest strength is known as its 'sensitivity'. Sensitivity is frequently spoken of as 'amplification' because present day receivers always amplify the desired signals.

Selectivity is secured by 'tuning'. Tuning consists in so adjusting the circuits of the receiving set that their oscillations are at the same rate as those of the high frequency wave which constitutes the desired signal.

It has long been known that if a receiving set is tuned to the same frequency as the desired wave, that wave has more effect upon the receiving set than any other. When thus tuned the receiving set becomes highly responsive to the desired wave and at the same time less responsive, or more opaque, to waves of different frequencies. And it is upon the basis of this well known fact that different inventors have constructed devices calculated to eliminate undesired signals and to secure and strengthen the desired signal. The more perfectly the undesired signals are excluded the better the selectivity of the receiving apparatus."

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Chappell & Co., Ltd.,

vs.

Associated Radio Co. of Australia Limited

"The object as in the case of the gramophone and the ordinary telephone with a continuous metallic connection is not to convey atmospheric disturbances directly as in speaking or acoustic tubes and other early contrivances but to *reproduce* at the place of audition atmospheric disturbances similar to those occurring at the place of sonation. We may take a short statement from a recent book 'Wireless' by P. J. Risdon, F. R. S. A., at p. 139, he says: 'It is customary to speak of wireless transmission of speech and of converting sound waves into ether waves and *vice versa* but as a matter of fact we do nothing of the kind. What we do is this: by means of sound waves we cause modulations in the flow of an electric current which impress corresponding modulations on the aerial current which in turn sets up a train of ether waves with modulations in them corresponding to the modulations in the original sound waves.

At the receiving end the process is reversed and sound waves are *produced* exactly like the original sound waves.' At p. 144 he says that 'amplifying' a current or current variations does not mean magnifying the same current but means that its variations are impressed upon another and more powerful current.

"At the receiving end the 'process is reversed' by having an aerial (or some equivalent) which has or can by simple adjustments be made to have the same fundamental frequency as the transmitting aerial so that it is made syntonic or 'tuned' to the corresponding wave lengths and by having a rectifier to get a unidirectional instead of an alternating current and an apparatus like an ordinary telephone receiver for the purpose of bringing about the atmospheric disturbances which result in audition. In certain cases there may also be necessary provisions for amplifying in the sense already explained. *The important matter is that in all cases of reproduction of what may be called similar sounds at a distance* the modulations in the original atmospheric disturbances are in a sense preserved though manifesting themselves at various stages and in various media in various ways, e. g., in the gramophone at one stage by the variations in the bottom of the grooves cut in the cylinder or disc, in the ordinary telephone at one stage by the variations in the strengths of the electric currents passing through the metallic conductor; and in broadcasting in the way just mentioned and also at another stage by the variations in the amplitudes of the series of electro-magnetic waves."

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

**No. 138.**

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, AND DE SYLVA, BROWN & HENDERSON, INC., A CORPORATION,

VS.

JEWELL-LA SALLE REALTY COMPANY, A CORPORATION.

**No. 139.**

GENE BUCK, AS PRESIDENT OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, AND LEO FEIST, INC., A CORPORATION,

VS.

JEWELL-LA SALLE REALTY COMPANY, A CORPORATION.

## BRIEF FOR JEWELL-LA SALLE REALTY COMPANY (APPELLEE BELOW) ON QUESTION I.

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MESERVEY, MICHAELS, BLACKMAR, NEWKIRK & EAGER,
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## BRIEF FOR JEWELL-LA SALLE REALTY COMPANY (APPELLEE BELOW) ON QUESTION I.

### STATEMENT.

In addition to the statement of facts contained in plaintiffs' brief, the following is pertinent. The plaintiffs have stated in their brief (p. 4) as follows: "It was, and is, the plaintiffs' contention that each de-

fendant had separately given a public performance for profit of the copyrighted musical compositions, etc."

The bill of complaint charges: "The defendants, jointly and severally, by means of and through the radio broadcasting station, and radio receiving sets, and other devices, owned, controlled and supplied by them respectively, as aforesaid (each defendant jointly and severally cooperating, causing and participating therein) gave and caused to be given public performances * * * on and in said premises known as the 'La Salle Hotel,' in Kansas City, Missouri, and that the defendants threaten to continue such infringing performances."

The statement of facts certified here by the Court of Appeals expressly states that each of the defendants acted independently of the other (p. 6). Had the contention been heretofore made that each defendant was guilty of a separate performance in a different place, each acting separately, there is serious doubt if the defendant Duncan, and the defendant Hotel Company, could be joined as co-defendants in the same suit.

## SUMMARY OF ARGUMENT.

Radio receiving cannot be held to be performing. Such a holding would prohibit the operation of receiving sets in public places; it would grant to every copyright owner autocratic power to extract tribute from every person operating a receiving set in public regardless of the merit of the copyrighted work and regardless of whether the composition was in fact ever broadcasted; Congress intended to place no such construction on the Copyright Act.

The Courts passing directly on the question now before this Court have held that the mere act of receiving is not performing by the one operating the receiving set.

Plaintiffs' rights are limited by the Copyright Act which is construed to protect the public against financial loss and damage unexpectedly and unwittingly incurred. The purpose and spirit of the statute, as clearly indicated by the provisions of the Act itself and by the decisions of this Court, is to grant to the copyright owner monopolistic control of performing rights, nothing more, and as the one operating a receiving set has no control over the performance heard through the set, it is not necessary that copyright owners have control of the use of receiving sets, and the rights claimed by the plaintiff are, therefore, not granted by the statute.

The scientific theory of radio telephony demonstrates with mathematical certainty that one operating

a receiving set is not in any sense the performer of the compositions the set picks up,. There is no analogy between playing a phonograph record and operating a receiving set.

No "profit" was received by the defendant by reason of the hearing of "Just Imagine" over its receiving set. Therefore there was no performance within the meaning of the Act.

The Courts have not held that broadcasting is performing. The broadcaster is held to be a performer only when he actually performs the selections he broadcasts. It is therefore begging the question to argue that receiving is performing because broadcasting is performing. Plaintiffs' argument here is inconsistent with that made in the broadcasting cases.

Defendant is not chargeable on any theory of agency with Duncan's infringing actions; and defendant cannot be held liable as a contributory infringer because its acts in installing and maintaining a receiving set cannot be held to be a proximate, direct or legal cause of or contribution to the infringing performance by the broadcaster.

## BRIEF OF ARGUMENT.

### I.

**Radio receiving cannot be held to be performing. Such a holding would prohibit the operation of receivings sets in public places; it would grant to every copyright owner autocratic power to extract tribute from every person operating a receiving set in public regardless of the merit of the copyrighted work and regardless of whether the composition was in fact ever broadcasted. Congress contended to place no such construction upon the Copyright Act.**

Plaintiffs, as owners of the copyright in "Just Imagine," contend in effect that defendant has no right to have its receiving set in operation while a third party stranger is broadcasting that selection. If the proposition is sound every copyright owner could make the same claim, and payment made by defendant to plaintiffs for license to pick up "Just Imagine" would be no protection if the set should happen to pick up any other selection. Within the last five years alone 162,164 performable copyrighted items (musical compositions, lectures, etc.) were registered with the patent office (1). This means over 2,700 new copyrights on performable matters each month. As defendant has no control over what the receiving set picks up it cannot know but that at any time any one of these thousands of copyrighted selections may be broadcast. A receiving set could not be operated safely in public without license from every one of the hundreds of thousands of the copyright owners, and each of such operators would have to continue to procure new licenses at the rate of 2,700 per month. This would apply to every hotel, cafe or other public place, small or large, in the entire country.

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(1) See 33rd Annual Report of Register of Copyrights, fiscal year ending June 30, 1930, an official government publication of which the Court will take judicial notice (p. 18).

No person in defendant's position, even with all the authority plaintiffs can bestow, would dare operate a receiving set if, in order to avoid infringement, tribute would have to be paid to every copyright owner, regardless of the merit of the copyrighted work. Furthermore any single copyright owner by refusing to give his consent to the operating of receiving sets could, as a practical matter, prevent their use in public places. A decision for plaintiffs will, therefore, deprive the hotel patronizing public of the advantages of radio communication.

The confusion which would result from sustaining plaintiffs' contentions would be intolerable. We submit that as a practical matter it would be impossible for anyone to sit at a receiving set and turn it off whenever a copyrighted selection was broadcast. It would require a thorough musical and literary training and an intimate knowledge of every copyrighted musical composition, lecture, dramatic composition and sermon. It would require that every person operating a receiving set in public be so thoroughly acquainted with each new copyright as it was registered that he would be able to instantly recognize it as soon as a performance of it was started. No single human brain could retain all that would be required to avoid infringement.

A receiving set in and of itself is a useless ornament. To pay plaintiffs a fee for the right to have its receiving set in operation while a broadcaster—stranger—performs "Just Imagine" would not, therefore, be paying for the right to perform that selection. Such payment would not be a license fee but an insurance premium to buy plaintiffs' good graces if someone else happens to perform. What assurance do plaintiffs offer that the defendant, after making such payment, will ever again pick up "Just Imagine"?

No law compels plaintiffs to broadcast or to permit broadcasting of its selection.

An author should receive reward according to the quality of his work, not by reason of a rule of law. Congress intended to assure *protection*, not *income*. As before stated no law compels plaintiffs to broadcast or to permit broadcasting. If the right is usurped by the broadcaster the statute grants the remedy of injunction against the broadcaster and that will quite effectively stop all receiving. If plaintiffs consent to broadcasting they know that there are receiving sets in innumerable hotels, cafes, bootblack shops and other business houses as well as homes and they should be estopped to complain of a result which they must necessarily know will follow from their consent so given. This Court should not declare a rule to be law for the purpose of making all copyrighted compositions paying propositions.

When a person procures from the copyright owners a license to perform a work, he does so because he actually desires to perform it. He should not be compelled to procure such a license because he fears that he may accidentally pick it up on the radio and in absence of a license be sued for damages.

II.

**The courts, passing directly on the question now before this Court, have held that the mere act of receiving is not performing by the one operating the receiving set.**

Judge Otis in a convincing opinion (2) decided that one who operates a receiving set is not a performer of

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(2) 32 Fed. (2d) 366.

the selections heard through the set. Since his opinion was published Judge McCormick in *Buck* v. *DeBaum* (D. C. S. D. Cal. 1929), 40 Fed. (2) 734, in a case where a receiving set was being operated in a cafe held (735) that:

> "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law."

Plaintiffs, in their brief (p. 20), claim this to be *dictum*. We do not agree. The decision was based on two separate and distinct grounds. The "implied license theory" was only one ground for the Court's decision. The question of "implied license" could have no relation to the question whether a receiver is a performer. The holding that receiving is not performing was therefore a distinct and separate ground for the decision and was not *dictum* any more than the remarks about implied license were *dictum*.

The Iowa Supreme Court in *Dunbar* v. *Spratt-Snyder Company*, (Ia.) 226 N. W. 22, under a statute exempting "musical instruments" from execution, held that a receiving set was not a musical instrument because it did not perform the matters heard through it. The Court said, 23:

> "A fundamental idea is contained within the definition of a musical instrument. This is the capacity of the instrument in and of itself when

properly operated to produce or initiate the musical sound. On the other hand, a radio cannot do this. Clearly, the radio would be of no use for musical purposes were it not for the fact that some place in a broadcasting station there is a musical instrument, or instruments, producing those sounds and harmonies which are pleasing to the human ear. Those musical instruments in that distant station, and not the radio, produce and initiate the music, within the definition before mentioned. Amplification by the radio of the sound called music is not effected because the sound is musical, but, rather because it is a sound. In truth, a radio is no more than an ear trumpet which enables the human ear to catch the sounds produced by the far-away musical instrument. Some ear trumpets, like the 'acousticon,' are 'no bigger than a dime,' yet when properly adjusted and attached to the head, aid the deaf in hearing.

"Likewise, a radio is an assistance to the human ear which, without such direct attachment to the head, accomplishes an enlarged hearing. Consequently, it is evident that the radio has no more relationship to music than it has to prose, political campaign speeches, sales talks, weather forecasts, descriptions of prize fights, football games, farm talks, and numerous other matters."

Mr. Stephen Davis, a prominent American writer on copyright matters, at page 116 of his work on *The Law of Radio Communication*, says:

"His (the listener's) receiving set is merely an artificial extension of his natural sense of hearing. But by its use, the scope of audition is extended far beyond natural range, just as the telescope increases the distance of vision. Man without artificial aid can hear the voice of another only within a few hundred yards, while by

radio he hears it a thousand miles or more away. He may use artifice to aid hearing just as he may assist sight. A receiving set bears a relation to his ears similar to that of spectacles or a telescope to his eyes."

Plaintiffs quote as authority a single sentence from *Messager* v. *The British Broadcasting Company, Ltd.*, 137 L. T. Rep. 810 (1927) 2 K. B. 543, and another sentence from *Copinger*: *The Law of Copyright*, an English publication (Pl. Br. p. 17-18).

The sentence quoted from the *Messager* case is removed from its context. In that case the defendant (through artists paid by it) performed an opera, "The Little Michus," in its own studio and broadcasted it. The question was whether by its acts in performing and broadcasting defendant had infringed the copyright. The Court argued that if the defendant had gathered the public into a vast assembly room equipped with a receiving instrument and had through its own broadcasting and receiving equipment made available to such an audience *its own performance* in its own studio it would be liable for infringement. The language quoted was clearly intended to hypothecate such a case. The Court then reasons that the defendant by performing and broadcasting gave a public performance even though this audience was widely scattered. It is too plain to require argument that Justice McCardy did not have in mind any such situation as is now before this Court in using the words quoted by plaintiffs apart from their context.

Judge Otis said of these citations (32 F. (2) l. c. 368):

> "Certain cases have been cited by the plaintiffs by reason of dicta thought by plaintiffs to be pertinent to the issue here, and those cases I have carefully considered, but I think they do not justify any other conclusion than that which I have reached."

## III.

**Plaintiffs' rights are limited by the copyright statute which is construed to protect the public against financial loss and damage unexpectedly and unwittingly incurred. The purpose and spirit of the statute, as clearly indicated by the provisions of the act itself and by the decisions of this Court, is to grant to the copyright owner monopolistic control of performing rights, nothing more, and as the one operating a receiving set has no control over the performance heard through the set, it is not necessary that copyright owners have control of the use of receiving sets, and the rights claimed by plaintiffs are, therefore, not granted by the statute.**

The present Copyright Act (U. S. Code, Title 17) was amended for the last time in 1913. The pioneer broadcasting station of the world, KDKA in Pittsburgh, was erected in 1921. In drafting the Act, therefore, its authors did not consider such a thing as radio communication as it exists today. "Radio" did not enter into the deliberations of Congress nor in any way influence the wording of the Act. A Court in applying the Act to such a state of facts will be controlled not by the wording of the statute but by its purpose and spirit. The problem is essentially one of statutory construction. All common law rights are extinguished by

copyrighting. *Photo-Drama, etc., Co.* v. *Social Uplift Film Corporation,* (2d C. C. A.) 220 Fed. 448, l. c. 450. In *American Code Co.* v. *Bensinger,* (2d C. C. A.) 282 Fed. 829, l. c. 833, it was said:

> "It is settled law of this country and England that the right of an author to a monopoly of his publications is measured and determined by the copyright statute."

See also: *White-Smith Pub. Co.* v. *Apollo,* 209 U. S. 1; *Lydiard-Peterson Co.* v. *Woodman,* (8th C. C. A.) 204 Fed. 921.

Plaintiffs under Point II of their brief (p. 9) refer to only half of the established rule of construction of copyright statutes. Granting that a court should not so limit the statute by judicial construction that *adequate* protection will not be given the copyrighter, it is just as clearly established that a court will not by judicial construction unduly extend the privileges given thereby to include rights not intended to be conferred. *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339, l. c. 346; *Remick & Co.* v. *Auto. Acc. Co.,* 5 Fed. (2d) 411, l. c. 411. In *Fromont* v. *Aeolian Co.,* 254 Fed. 592, it was said, l. c. 594:

> "While unquestionably this exceedingly useful statute was passed primarily to protect authors, composers, and artists of various kinds, and to secure for them the reward of their labors, yet the Act is construed in such a manner as to safeguard the public against financial loss and damage unexpectedly and unwittingly incurred."

Section 1 of the Copyright Act (U. S. Code, Title 17) grants to the "person entitled thereto" the "ex-

clusive right," in substance, *to make and sell copies* of the copyrighted work and to *perform* the work publicly for profit "if it be a musical composition and for the the purpose of public performance for profit." A composition has two valuable incidents: (1) the right to make and sell copies (which includes the right to make and sell any *record* of the composition which would enable another to perform it, whether that record be in the form of sheet music which would enable a skilled artist to perform the composition on a musical instrument by reading the music, or whether that record be in the form of a piece of mechanism such as a piano roll, grind organ record or phonograph record, which would enable an unskilled layman to perform the composition mechanically. See Section 1 (e) where the right relative to making copies (Section 1 (a)) is defined to extend to the right " * * * to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced"), and (2) the right to perform the composition for profit (whether by skilled performer or by a layman mechanically).

But the Act clearly intended to give to the author *monopolistic control* over both of their rights, and no more. Congress did not contemplate a situation where a single performance could be heard in various places and at great distances from the performer. It *did* contemplate that a single copy or record might pass through several hands. The intention to limit the rights of the copyrighter to a monopolistic *control* is indi-

cated by the *express* provisions of the Act and the decisions of this Court relative to the right to *copy*. The statute provides (Section 41) that " * * * nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained." This is legislative approval of the prior decisions of this Court to the effect that a copyrighter's rights do not attach, throughout, but only at the *source* of each copy. In *Bobbs-Merrill Co.* v. *Straus, supra,* (3) the syllabus states the law of the case:

> "The sole right to vend granted by Section 4952, Rev. Stat., does not secure to the owner of the copyright the right to qualify future sales by his vendee or to limit or restrict such future sales at a specified price, and a notice in the book that a sale at a different price will be treated as an infringement, is ineffectual as against one not bound by contract or license agreement."

On the same day, this Court also held that though sundry jobbers and dealers infringed a copyright by selling copies to the defendant, one Straus, in violation of their contract with the copyright owners (plaintiff claimed the dealers were induced to do this by Straus) Straus was not a contributory infringer as "there was no satisfactory proof that the defendant did thus induce any person to break his agreement with the complainants." *Scribner* v. *Straus,* 210 U. S. 352, 355. The reason for the decisions is clear—the rights claimed were not *necessary* to the protection of the monoply

(3) 210 U. S. 339.

granted, and to hold that the statute granted more than the right to control the source of each copy, *i. e.*, the manufacture and original sale, and all those *directly* connected therewith as agents or promoters, would be to extend the statute "by judicial construction to include privileges not intended to be conferred" (210 U. S., l. c. 346). There was no evidence that Straus induced the original infringement or was a party to it (he merely purchased copies from the infringers), therefore it was not necessary in order to protect a monoply that the copyright owner have control of his actions. That he indirectly made a profit out of the infringement is immaterial. Thus stands the law as to the right of *copy*.

By means of radio a single performance is heard in many and distant places. We do not insist that the statute does not apply merely because the situation is new. But we do insist that neither does it apply for that reason, as seems to be plaintiff's contention under their point three (p. 4). The question is whether the new situation is reasonably within the purpose or spirit of the Act. As this purpose or spirit is to protect the monopoly of the author in his performing rights is it *necessary* in order to protect that monopoly to grant him control of both broadcasting and receiving? If performing rights are to be protected the owner must have the right to control not only performances by skilled artists but also must have control of the use of all mehanical instruments which can at the will of their owner be used to mechanically perform the author's work. One owning a phonograph record of "Just Imagine" can with that record perform "Just Imagine"

when and where he pleases and unless the owner is given the right to control the use of such record, his performing rights are indeed empty. The same is true of a motion picture film or in fact of any mechanical record or instrument by means of which a person can *at will* mechanically perform the protected selection. But just as it was not necessary to the author's *monopoly* to grant privileges beyond the manufacturer and original dealer in the case of copies so it is not necessary to grant privileges beyond the original performer and broadcaster in the case of radio. Control over receiving sets follows automatically as the operator of the receiving set could *never* render a performance of "Just Imagine" or anything else with his receiving set. Under the Bobbs-Merrill and Scribner cases plaintiffs must show not only that defendant "picked up" the selection "Just Imagine" but must go further and say that defendant induced the broadcaster to infringe plaintiffs' contract by performing and broadcasting. The stipulated facts here are that this defendant had absolutely nothing to do with the performance and broadcasting (Cert. 6).

If plaintiffs do not want receiving they can prohibit performing as in the Bobbs-Merrill case Straus' actions could have been controlled by prohibiting the original publication or sale. If the broadcaster usurps the right to broadcast he can be enjoined just as the broadcaster in the case at bar was enjoined and as the manufacturer and original dealer in the Bobbs-Merrill case could have been enjoined. Such an injunction would

prevent reception just as much as an injunction against the manufacturer and original dealer in the Bobbs-Merrill case would have prevented further sales by Straus. The purpose of the Copyright Act having been clearly indicated by Congress and by this Court, the accomplishment of that purpose does not require that the privilege of controlling the use of receiving sets be granted to the copyright owner. The above considerations alone preclude the necessity of deciding whether the act of receiving is literally "performing" for no principle of statutory construction is better settled than that the letter of a statute cannot be applied to an entirely new situation not within its spirit nor within the contemplation of the Legislature.

> "It does not, therefore, follow, that when a word was used in a statute or a contract seventy years since, that it must be held to include everything to which the same word is applied at the present day."
>
> (*Bridge Proprietors* v. *Hoboken Co.*, 68 U. S. (1 Wallace) 116, l. c. 148.)

> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its maker" (*Holy Trinity Church* v. *U. S.*, 143 U. S. 457, l. c. 459).

To hold that receiving by radio is performing, is to place a construction upon the Copyright Act which is neither within the spirit nor the letter of the Act.

## IV.

**The scientific theory of radio telephoning demonstrates with mathematical certainty that one operating a receiving set is not in any sense the performer of the compositions the set picks up. There is no analogy between playing a phonograph record and operating a receiving set.**

Considered from a purely scientific viewpoint, it is mathematically certain that a person operating a receiving set is no more a *performer* of the compositions heard through the set than is a person sitting in a theatre and listening to a stage production.

The physicist tells us that energy is capacity for doing mechanical work (9), and that work is the accomplishment of motion (10). A *performer* is clearly one who exerts the energy which accomplishes the "work" in the scientific sense. In the case of a performance of a musical composition, the work sought to be accomplished is the movement of the ear drums of the listener. The *performer* is the one who originally exerts or sets in motion the force or energy which, though passing through various forms and mediums, accomplishes that result. Energy exerted by a performer is ordinarily transmitted to the eardrum of the listener by air waves, causing it

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(9) Kimball: College Text Book of Physics, 3rd Edition (N. Y. 1923) Henry Holt & Co. (Lib. Corp. Q. C. K5) l. c. 41.

(10) Id., l. c. 39-40.

to move in accordance with the intention of the performer (11).

> "Only three methods are known by which energy may be transmitted from one point of space to another. *First, by the movement as a whole of some medium reaching from one point to the other,* as in the case of ropes, belts or shafting.
>
> *Second, by projectiles,* as in the case of a shot from a gun or a ball thrown.
>
> *Third, by waves,* as in the case of sound or water waves" (12).

Sound is the sensation caused by the bombardment of air waves against the ear drum, causing it to vibrate in accordance with the frequency of the waves. Air waves are set up by vibrations of some body, and—

> "Tuning forks are set in vibration by *being struck,* strings by *being bowed* • • • " (13) (italics ours).

The performer in such cases is the one who exerts the energy in striking the fork or bowing the string. The energy thus exerted by the performer is not spent until the work of vibrating the listener's ear drum is accomplished.

In radio telephony there is set up at the broadcasting station a smoothly oscillating electric current, the oscillations causing the antenna to become alter-

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(11) Id., l. c. 180 et seq., "Wave Motion and Sound."

(12) Id., l. c. 576.

(13) Id., l. c. 188.

nately, positively and negatively charged (14). The current oscillates at a frequency of from about 15,000 to over 10,000,000 cycles per second (15). (Sound waves have a frequency of from 16 to 16,000 per second (16).) The attraction of the electric charges in the antenna for the opposite charges in the ground causes the ether (a hypothetical substance) between the two to become strained, and as the charges alternate with the oscillating current, the ether is alternately strained and released accordingly. This strained condition represents energy, which, as the current in the sending set oscillates, breaks away and travels out from the broadcasting station in waves the same as energy evidenced by disturbances on the surface of water travels out in waves from the source of a disturbance (17). All waves in ether (which include radio waves—they differing from light waves only in the wave length), regardless of their frequency or strength, travel at the same speed, the speed of light—186,000

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(14) Robison's Manual of Radio Telegraphy and Telephony, by Commander (now Rear Admiral) S. S. Robison, U. S. Navy, 7th Revised Edition, 1927, The U. S. Naval Institute, Annapolis, Md. (Lib. Corp. T. K. 5741 R7). l. c. 353-354; L. Grant Hector: Principles of Modern Radio Receiving, (N. Y.) Benton Pub. Co., 1927 (Lib. Corp. T. K. 6550 H365), l. c. 15; John V. L. Hogan: The Outline of Radio, (Boston), Little, Brown & Co., 1928 (Lib. Corp. T. K. 6550 H55), l. c. 81-82.

(15) Hogan, supra, l. c. 62-63, 81.

(16) Id., l. c. 41.

(17) See Hector, supra, l. c. 24-30; Robison, supra, l. c. 463-516; Hogan, supra, l. c. 65-86; also Merle Duston: Radio Theory Simplified. (Racine, Wis.) Whitman Pub. Co., 1924 (Lib. Corp. T. K. 6550, D85), l. c. 19-35.

miles per second (18). If the oscillating current is unmodified the radio waves sent out are also unmodified (19). This smoothly flowing series of radio waves of equal strength is termed the carrier wave, which in and of itself will not cause the receiving set diaphragm to move (20).

A microphone is placed in the circuit of the sending set so that the oscillating current passes through it. A microphone, fundamentally, consists of a pocket of powdered carbon with a diaphragm placed against it. This carbon is of the nature that its resistance to electric current will vary with varying pressure against the diaphragm. It follows that the oscillating current passing through it will vary accordingly in strength (21).

The energy exerted by the performer in the studio causes the string or fork to vibrate (from 16 to 16,000 times per second), and these vibrations in turn set up waves of energy in the air, which waves travel (at the rate of about 1,100 feet per second) to the diaphragm of the microphone causing it to vibrate in the same manner as the string or fork. The energy thus striking the microphone changes its form to increased resistance in the carbon, then to modulations

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(18) Hogan, supra, l. c. 62.

(19) Id., l. c. 86.

(20) Hector, supra, l. c. 27.

(21) Robison, supra, l. c. 445 et seq.

in the strength of the oscillating current, then to modulations in the carrier wave. The carrier wave, by reason of the energy thus exerted by the performer, is modulated to assume exactly the shape of the sound waves. Thus: each air wave coming from vibrations at the rate of 50 per second will modify the oscillating current for 1/50 of a second, and if the current is oscillating at a frequency of 1,000,000 cycles per second, each of such sound waves will affect the resistance of the microphone during 20,000 oscillations and will accordingly modify or mould 20,000 radio waves (22).

It can be seen that *the energy exerted by the performer* has done the work of moulding or modifying the smooth carrier wave so that the crest of that wave is in exactly the same shape as the sound wave sent out by the performer. *The carrier wave is modulated not by reason of any act of the broadcaster, but solely by reason of the energy exerted by the performer.*

The receiving set is nothing more nor less than a target for the energy sent out by the broadcasting station to strike. As the radio waves were created by an oscillating electric current in the sending set, so that wave will automatically set up in the receiving circuit a corresponding oscillating current as it strikes the receiving aerial (23). If the carrier wave is unmodulated, the oscillating current set up in the receiv-

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(22) See figures: Robison, supra, l. c. 334; Hogan, supra, l. c. 102; Hector, supra, l. c. 27, 28, 29; Duston, supra, l. c. 28, 53, 55.

(23) Hogan, supra, l. c. 128-131; Hector, supra, l. c. 30-31.

ing set will also be unmodulated; if modulated, the current set up will also be modulated, and there is nothing that the operator of the receiving set can do about it. Some receiving sets are supplied with electric current, which merely strengthens the oscillations set up by the carrier wave if the current by *"tuning"* is caused to oscillate at the same frequency as that of the carrier wave. This current does not in any other way affect the current set up by the carrier wave. It has no effect on the character of the modulations. There is placed in the circuit of the receiving set a detector (either a tube or crystal) which has the property of permitting electric current to pass through it one way only (24). After the oscillating current passes through the detector, it therefore becomes a pulsating direct current. This direct current passes through an earphone or loud speaker (an integral part of the receiving apparatus) which fundamentally consists of an electric magnet placed near a metal diaphragm (25). The pulsing of the direct current through the magnet (1,000,000 pulses per second in our example) exerts in effect a steady pull on the receiving diaphragm, as that diaphragm is not sensative enough to vibrate at such a high frequency. If the current is unmodulated, the pull of the magnet remains in effect constant, and the diaphragm will not move. If modulated, the pull of the magnet correspondingly

(24) Hector, supra, l. c. 33; Duston, supra, l. c. 45.

(25) Robison, supra, l. c. 448.

varies, causing the diaphragm to vibrate accordingly. Again referring to our example, if sound waves of a frequency of 50 cycles per second strike the microphone, 20,000 carrier waves will be modulated by each sound wave, and 20,000 pulses beyond the detector will be accordingly modulated, causing the diaphragm of the receiving set to react exactly as did the diaphragm of the microphone. Very instructive illustrations of the entire process are found in one of the texts to which we have referred (26).

Plaintiffs' argument fails to recognize what sound is. It is stated (p. 23) that "*no sound* is carried by the so-called radio waves." Sound is not a matter of substance like gold or wheat. It is *energy,* the evidence of its existence being waves in the air or some other substance. In radio processes, this energy may change the form in which it is made evident (just as light may become heat and heat create motion) but the *energy* exerted by the performer in the studio carries through the entire radio cycle until it vibrates the eardrum of the listeners. The radio equipment merely constitutes a *medium* through which the energy exerted by the performer is made felt. There is a definite sequence of cause and effect throughout the entire process. The actions of the broadcaster and the receiver may raise a question of *contributory infringement* by reason of the fact that the medium of performance was set up by them, but on no logical

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(26) Duston, supra, l. c. 33, 45.

theory can either be said to be performers of the selections heard over the radio.

Every listener supplies, in the same sense, part of the *means* of performance, i. e., the eardrums through which the sense of sound is communicated to the brain. The functioning of the receiving set is as automatic as the functioning of the eardrum of the ordinary listener. It would be unthinkable to argue that every person owning land was a performer of all musical compositions heard by listeners as a result of energy passing through the air (a necessary medium) over such land.

Plaintiffs throughout their brief represent the defendant as one who intentionally and deliberately reaches out into the air, picks up a recognizable material substance, brings it into its hotel, examines it, decides that it wants to use it to entertain its guests, then with due deliberation puts it into a machine, changes its form, carries it thus changed to its several rooms and sells it; just as one would take ore from a mine, smelt it, pound the metal into jewelry and sell it (as witness the argument on page 23 of their brief where they speak of "picking-up" and "rebroadcasting" as separate acts). As appears from the analysis of radio processes we have made above, it is clear that the defendant has absolutely no control over the impulses thrown against its aerial or the form they take. The term "pick-up" is misleading. The receiving set does not literally pick up anything. It *merely reacts* to impulses or forces thrown

into it. One may as well speak of a boxer "picking-up" a blow on the chin.

There is no element of "receiving" and "rebroadcasting" as separate and distinct acts. The impulses are merely *forces* which produce their own results and cannot be examined, tried out and discarded at will, as can be done with a phonograph record. The defendant knows no sooner than any of its guests what is going on at the broadcasting station, and it is not any more responsible for what goes on there than are its guests. It is further immaterial where the loud speakers or headphones are located—whether in a cabinet with the tubes or in another room or rooms; the same observations equally apply in either case.

"Could a distorted reception, full of howls and shrieks, be said to be the hearing of an original clear performance?" (Pl. Br. p. 28). Certainly! That the eardrum of the listener is at the same time affected by forces from sources other than the performer in the studio of the broadcaster does not mean that the listener is not hearing the performer. If your partner converses while a show is in progress you are nevertheless hearing the show. This is not poor *reproduction* but poor *audition* of the original. If a set has poor selectivity, two programs from two stations are heard at the same time. Would plaintiffs say a defendant operating a set when both programs are heard was performing both compositions at once?

"Or could it be said the vocal effort of a 'whispering tenor,' audible for a hundred feet at best, is the

*same* as a radio production thereof, in an open air address system, where it can be made to be heard for miles?" (Pl. Br. p. 28). Certainly! Archimides once said "Give me a lever long enough and a prop strong enough, I can single handed move the world." The whispering tenor can with as much assurance say, "Give me a radio broadcasting system powerful enough and I can vibrate every eardrum in the world."

Nor does the speed of audition change the legal nature of the case. Waves in ether all travel so fast that they will circumnavigate the globe in about one-tenth of a second. For practical purposes, therefore, a time signal given by the broadcaster may be accepted as accurate when picked up on the receiving set.

There is no analogy between the playing of a phonograph record and radio reception. The performer in the record manufacturer's studio is the one who exerts the energy in striking the keys of a piano or bowing a string, etc. The energy he thus exerts is transmitted to the vibrating strings and thence by waves to the diaphragm of the recording instrument, and *is spent in impressing a record* on the bakelite disc. No further "work" can be accomplished by the energy then exerted by those performers. That performance is therefore over. Thousands of duplicates of this record are made and sold. One is placed in a machine and is played. The sound waves produced—energy—are entirely the evidence of new energy then applied to the record, not of the energy exerted by the performers in the manufacturer's studio. The performer—the one originally exerting

the force which vibrates the eardrums of the listeners —is clearly the one playing the record. The record may be played slower or faster than when made in which case the waves sent out will have different wave lengths than those created by the performer in the studio of the manufacturer. It would be practically impossible to play two records of the same performance at once without unbearable discord whereas fifty receiving sets in the same room all turned on at once would be in entire accord. As said by the Honorable District Court (32 Fed. (2), l. c. 367):

> "The record on bakelite (the disc of the phonograph) is a separate and distinct thing from the original performance in the studio where the record was made. Playing that record is performing anew the musical composition imprinted upon it. The waves thrown out upon the ether are not a record of the original performance. They are the original performance. The *reception* is not a *reproduction* but a *hearing* of the original performance."

Plaintiffs criticize this language (p. 27) but the statement is exactly in accord with scientific fact. Plaintiffs' argument (p. 27) that the radio waves carry a record of the original performance is not in accord with scientific fact.

The playing of a phonograph record is exactly analogous to performing. The operation of a radio receiving set is exactly analogous to listening, and it is directly opposed to any conception of a performance.

V.

**No "Profit" was received by the defendant by reason of the hearing of "Just Imagine" over its receiving set, therefore there was no performance within the meaning of the Act.**

In order for plaintiffs to establish that defendant performed within the meaning of the Act, it is incumbent upon them to show that defendant received a profit, at least indirectly, by reason of the hearing of the selection in its hotel. The burden is not met by merely citing the case of *Herbert* v. *Shanley*, 242 U. S. 591, holding that a performance by an orchestra in a hotel was for the profit of the hotel. That case does not apply here.

Radio, like the telephone, is not a musical instrument but an instrument of communication. Many hotels have installed telephone systems with a central control board in the office, and advertise this fact to induce patronage. Identically the same thing has been done in the case of radio.

But do people patronize the hotel where telephones are installed because of any representation by the hotel that any particular item of intelligence will be communicated over the telephone? The hotel patronizing public know that the hotel does not represent that anything will be communicated to its patrons over the telephones it has installed for their use. They go to the hotel not because of what they will hear over the telephones but rather because the telephones are there.

Radio differs only in that communication is ordinarily conducted but one way. But the analogy is

accurate. The public realizes that the hotel in advertising the installation of radio receiving sets, does not purport to represent that any particular item of intelligence or entertainment will be communicated to its patrons thereby, or that anything at all will be communicated. They are likewise induced to patronize the hotel not because of what they will hear over the radio but rather because the radio is there.

That music is more frequently communicated over radio than over telephone does not change the legal situation. *The profit received by defendant is the same whether the broadcaster will or will not broadcast "Just Imagine" or any other particular copyrighted selection, or any musical compositions at all.* This clearly demonstrates that defendant did not in any legal sense derive profit from the hearing of "Just Imagine" as charged. Such performances are not for the profit of defendant, but rather solely for the profit of the broadcaster. This is not true if the compositions are played by the hotel's orchestra or phonograph. In such cases the performances are by the hotel, and the public has to come to the hotel to enjoy them. In the case of radio, however, there is no incentive found in the reception itself to go to the hotel, for identically the same performance at the same time can be heard anywhere a receiving set is found within the range of the broadcasting station. Any profit would at most be legally remote, and as said by Judge Mayer in *Fromont* v. *Aeolian Co.*, 254 Fed. 592, one is not an infringer who derives no profit "excepting in the very remote way in which it is urged that this defendant landlord derived profit here."

The only possible profit in these cases is patronage induced, and as it appears that patronage is induced not by reason of what is heard over the receiving set, but rather solely by the receiving set itself, plaintiffs have again failed to establish that defendant has performed within the meaning of the Copyright Act.

## VI.

**The Courts have not held that broadcasting is "performing." The broadcaster is held to be a performer only when he actually performs the selections he broadcasts. It is therefore begging the question to argue that receiving is performing because broadcasting is performing. Plaintiffs' argument here is inconsistent with that made in the broadcasting cases.**

Under point two of their brief (p. 13) plaintiffs state that the courts have "brushed aside all * * * sophistries" in determining infringers' rights under "a broad and liberal construction" of the words, "public performance for profit." By such generalities plaintiffs seek to avoid the reasons back of the decisions and to force the illogical conclusion that "receiving" is "performing." Plaintiffs point out (1) that an admitted public performance is *for profit* if rendered to induce patronage though no direct charge is made; (2) that a restaurant or theater owner who performs a selection on an organ or by orchestra is an infringer; (3) that one playing a phonograph record or a music roll is a performer and therefore an infringer; and (4) that (p. 10) "broadcasting by radio of the rendition of a copyrighted musical composition constitutes an infringement of the copyright" (note that plaintiffs do

not state that the mere broadcaster is held to be a *performer*).

The first three propositions are correctly stated though they go more to the question of "profit" than of "performance." The last proposition is not an accurate statement. As to broadcasting it is held (1) that one performing a copyrighted selection and broadcasting his own performance is an infringer and (2) that one broadcasting the *unauthorized* performance of another is (not a performer but) a *contributory infringer.*

Plaintiffs, again speaking in generalities, conclude (p. 13) that: "The decisions have been progressive and have met every new condition as it has arisen—first the orchestra or cabaret in the restaurant, then the moving picture theater, and, finally, the radio broadcaster." By thus grouping the *infringers* apart from the reasons why each is held to have infringed, attempt is made to force the conclusion (by implication) that the mere act of broadcasting is held to be performing, and that therefore merely receiving is performing.

In all but one of the cases cited by plaintiffs where the broadcaster was held liable as an infringer the broadcaster himself performed the selections broadcasted (27). In the one case where the broadcaster was

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(27) M. Witmark & Sons v. Bamberger, 291 Fed. 776; Remick v. American Automobile Accessories Co., 5 Fed. (2d) 411; Messager v. British Broadcasting Co., Ltd., 137 L. T. Rep. 810 (1927) 2 K. B. 543; Chappell & Co., Ltd. v. Associated Radio Companies of Australia, 50 Victoria App. Law Rep. 350 (1925).

not also the performer [28] the Court held him liable solely on the theory of contributory infringement, not on the theory that he performed. In that case Judge Knox said [29]:

> "I can conceive of conditions under which the unauthorized broadcasting of a copyrighted musical composition will be nothing else than its public performance for profit.
>
> But in any such inquiry I think it necessary to ascertain whose performance was broadcast. Was it that of the broadcaster, or was it that of another person, who may have been authorized to perform the copyrighted composition publicly and for profit? *If the latter, I do not believe the broadcaster is to be held liable.* By means of the radio art he simply makes a given performance available to a great number of persons who, but for his efforts, would not hear it. So far as practical results are concerned, the broadcaster of the authorized performance of a copyrighted musical selection does little more than the mechanic who rigs an amplifier or loud speaker in a large auditorium, to the end that persons in remote sections of the hall may hear what transpires upon its stage or rostrum. Such broadcasting merely gives the authorized performer a larger audience, and *is not to be regarded as a separate and distinct performance of the copyrighted composition upon the part of the broadcaster.* When allowance is made for the shrieks, howls, and sibilant noises attributable to static and interference, *the possessor of a radio receiving set attuned to the station of the broadcaster of an authorized performance hears only the selection as it is rendered by the per-*

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(28) Jerome H. Remick & Co. v. General Electric Co., 4 Fed. (2d) 160 (Knox, P. J., on Motion to Dismiss) and 16 Fed. (2d) 829 (Thatcher, P. J., on Final Hearing).

(29) 4 Fed. (2d) l. c. 160-161.

*former.* The performance is one and the same whether the 'listener in' be at the elbow of the leader of the orchestra playing the selection, or at a distance of 1,000 miles.

If a broadcaster *procures* an unauthorized performance of a copyrighted musical composition to be given, and for his own profit makes the same available to the public served by radio receiving sets attuned to his station, he is, in my judgment, to be regarded as an infringer. It may also be that he becomes a *contributory infringer* in the event he broadcasts the unauthorized performance by another of a copyrighted musical composition. To this proposition, however, I do not now finally commit myself. * * * Should it appear that the performance of the selection was authorized by plaintiff, it will be impossible to find infringement upon the part of the broadcaster" (italics ours).

It was this proposition that Judge Thatcher decided on final hearing (16 Fed. (2) 829). He decided not that the mere broadcaster of another's unauthorized performance is a performer but rather that he is a contributory infringer, and speaks of "the character of his acts of contributory infringement."

The analogy on the question of "performance" is between (1) the restaurant owner who plays the music, (2) the theater owner who operates the picture, and (3) the broadcaster who also performs the compositions broadcast. To argue, therefore, that a receiver is a performer because a broadcaster is held to be a performer is entirely to disregard the fact that where the broadcaster has been so held *he was in fact the performer as well as the broadcaster.* The analogy would carry through to the case at bar if the defendant had performed or had procured the performance of the

rendition of "Just Imagine" in the studio of the broadcaster, and the selection was heard in the hotel by radio. The stipulated facts are that the defendant had absolutely nothing to do with that performance (Cert. 6).

A non-performing broadcaster is not held as a performer by brushing aside all "sophistries" and doing violence to the plain meaning of the statute under the guise of a "broad and liberal construction" of the words "public performance for profit," but is held liable, on established principles of concurring or contributory tort feasance, as a *contributor* in the legal sense to what is clearly a "public performance for profit" by another.

Only once in plaintiffs' brief is it directly stated that "the courts of this country and abroad have held that a broadcaster 'performs'" (p. 31). As shown above, this statement is incorrect.

The distinction between *performing* and *contributing* is vital because, as we will show, the considerations which might lead to the conclusion that a non-performing broadcaster is liable for contributory infringement do not apply to one operating a receiving set.

Plaintiffs' position here is inconsistent with that taken by their counsel in *Witmark & Sons* v. *Bamberger & Company*, 291 Fed. 776, and in *Remick & Co.* v. *American Auto Acc. Co.*, 5 Fed. (2d) 411. In both of those cases the performance by the defendant broadcaster was held to be *public* on the theory that the public was listening to the performance in the studio and

not to a performance at each receiving set. In the latter case it was said, 412:

> "A performance, in our judgment, is no less public because the *listeners* are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each *listener* may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other *medium of performance. The artist* is consciously addressing a great, though unseen and widely scattered, *audience*, and is therefore participating in a public performance" (italics ours).

Here the same counsel contend that the people listening to the program are not listening to the performance in the studio of the broadcaster at all, but to a new and separate performance by the one operating the receiving set. If the broadcaster is sued, the one receiving is listening; but if the receiver is sued, he is performing! The positions are inconsistent.

## VII.

**Defendant is not chargeable, on any theory of agency, with Duncan's infringing actions; and defendant cannot be held liable as a contributory infringer because its acts in installing and maintaining a receiving set cannot be held to be a proximate, direct or legal cause of or contribution to the infringing performance by the broadcaster.**

Infringement of copyright is a tort. Liability in tort can only be established by showing either (1)

that the wrongful act of defendant himself produced the result complained of, (2) that the wrongful act of an agent of defendant (some third person acting for and in behalf of the defendant within the scope of his authority) caused the result complained of (*respondeat superior*), or (3) that the *wrongful* act of defendant or his agent presently concurred with the wrongful act of some third party to produce the result complained of (joint or contributory tort-feasance).

The question certified would seem to limit consideration to the first of the types of liability mentioned, the question being whether the one operation the receiving set *performs* within the meaning of the Act. Considering the instruments at defendant's command and under defendant's control at the time of the alleged tortious result, and considering what *defendant* did with those instruments (not the reaction of those instruments because of what a third party stranger did to them) it seems too plain for argument that the result complained of would never have followed from defendant's acts alone. As said by the majority of the Iowa Supreme Court in *Dunbar* v. *Spratt-Snyder Co., supra,* (30), l. c. 24:

> "The minority may operate their radios until the rounds of Jacob's ladder, to which they refer, are worn out by the angels, and no musical tones will ever be heard by a human ear unless some musical instrument or human voice produced them."

(30) 226 N. W. 22.

Since the result of which plaintiffs complain (the hearing of "Just Imagine" in the hotel) never could have followed from defendant's acts alone in operating the receiving set, defendant is not a performer but at most a *contributor* to the performance of another, and the question is then whether it is liable as a contributory infringer, not as a performer. This would seem to be axiomatic.

Whatever liability defendant Duncan may have incurred by reason of his unauthorized performance and broadcasting of plaintiffs' composition, it is clear that this defendant is responsible for its *own* acts only, and is not in any way to be held liable because of anything *Duncan* did. Duncan acted entirely without any direction, procurement or solicitation on the part of this defendant, very likely without knowledge of this defendant's existence (Cert. p. 6). There is no relation of agency between the defendants so as to charge either with the wrongful acts of the other, as agency exists only through mutual assent of the parties. The mere fact that their concurring independent acts unwittingly united to produce the result complained of does not establish an agency between the defendants. This defendant could in no way affect, control or regulate the conduct of Duncan, and cannot therefore be held liable for his conduct. The theory of *respondeat superior* will not apply.

In the case of *Kelly's Directories, Ltd.*, v. *Gavin and Lloyds,* (1901) 1 Ch. Div. 374 (Aff. (1902) 1 Ch. Div. 631), Lloyds Company was under contract with Gavin to print for him a book called "Lloyds' Diary

for Merchants," and Lloyds was to receive stipulated commissions for the use of its name. It could not finish the printing in time, and Gavin secured its permission to have part of the "Diary" printed elsewhere, which part turned out to contain infringing matter. The book was bound by Gavins. Plaintiff sought to hold Lloyds liable for "printing or causing to be printed" the infringing matter, on the theory of agency. The Court denied the claim, saying, l. c. 381-382:

> " * * * I do not think having given it careful consideration, that I should be justified in holding that the printing by the third party to the agreement (contract between Gavin and Lloyds) but who printed on order from Gavin and was paid by him, was something done by an agent of Lloyds."

In *Russell* v. *Briant,* 8 C. B. 836 (per Wilde, C. J.) it was said, l. c. 848:

> " * * * if it were held that all those who supply some of the means of representation to him who actually represents are to be regarded as thereby constituting him their agent, and thus causing the representation, within the meaning of the act, such a doctrine would, we think, embrace a class of persons not at all intended by the Legislature."

Our case is stronger, as there was no privity between this defendant and Duncan. We have found no cases, none has been cited by plaintiffs, and we believe that for apparent reasons none can be found, holding one person liable for the infringing acts of

another where this element of contract or privity by mutual consent does not exist.

Our point is that, in considering whether this defendant is liable, only the acts and intention of this defendant can be considered, not the acts of Duncan, and that the only possible theory of liability in this case is that of contributory infringement.

It is not the law that all who supply any of the necessary elements contributing to the infringing performance of another and receive indirectly a profit therefrom are liable as contributory infringers regardless of intention. If this were the law plaintiffs would have a cause of action against the owner of the building where the broadcasting studio was located who received rent from the broadcaster; against the power company, which, for a financial return, supplied the power necessary to the broadcast; against the man employed by the power company who received wages for operating the power producing machines; against the manufacturers of the broadcasting and receiving equipment, and so on, *ad infinitum*. These examples seem extreme, but in every case the company or person named is directly and proximately contributing at the time of the performance a *necessary* element and each is receiving a more direct profit for his energy thus exercised or material thus supplied than is the defendant in the case at bar. These persons are relieved from liability as contributors because of the lawful nature of their acts considered independently and their lack of intention to cooperate with another in

bringing about the particular result which the law declares to be unlawful. See *Russell* v. *Bryant, supra.*

Plaintiffs argue that lack of intention to infringe is immaterial, citing cases (p. 30). But there is a vast difference between (a) *intending to infringe* and (b) *intending the particular result which is an infringement.* The first relates to legal consequences. The latter relates to actual factual results.

A defendant is liable as a contributory tort-feasor only if he knows, or is charged in law with knowing that the result which must or which he knows reasonably will follow from his act is of the character which the law declares unlawful. If he intentionally contributes for the purpose of bringing about that particular result, it is immaterial that he does not know that that result is forbidden in law. In the case of nonperforming broadcaster the broadcaster knows that the only possible result of his act is the making public of that particular performance of that particular selection. He is in direct contact with the former, i. e. in privity or collusion with him and can, by virtue of this position, be held to be an intentional contributor to that particular performance. He knows the exact result which must follow from his acts in broadcasting and if that result is unlawful his intention to infringe is immaterial.

The situation as to the receiver is different. It is a well established rule of Copyright Law of contributory infringement that *if a lawful result could reasonably follow from defendant's acts plaintiffs are bound to prove that the infringement which does result*

*in part from defendant's acts was actually promoted or induced by the defendant.* In *Harper* v. *Shoppell*, 26 Fed. 519, where the Court also states the rule that intention to infringe is immaterial, the Court held as follows, l. c. 521:

> "The cut was capable of use innocently in various ways, having no relation to the publication and sale of a newspaper. If the defendant had sold the electrotype plate, intending or even expecting the purchasers to use it in competition with the plaintiff, he might be regarded as having sanctioned that use in advance, and consequently as occupying the position of a party acting in concert with them and responsible with them as joint tort-feasors. * * * There is no evidence, however, in this case that the defendant contemplated that the purchasers would make any illegitimate use of the plate. They could have used it, as he could, to print a trademark or an advertising cut, or in other ways which could not interfere with the sale of the plaintiffs' newspaper. *The law will not assume upon proof that the proprietors of a newspaper, that he intended to authorize a violation of the plaintiff's rights*" (italics ours).

And in *Harper* v. *Kalem*, (2nd C. C. A.) 169 Fed. 61 (Aff. *Kalem* v. *Harper*, 222 U. S. 55), the Court said, l. c. 64:

> "It is next objected that the defendant cannot be held as a contributory infringer because its films are capable of innocent use: e. g., exhibitions for private amusement. This fact only *compels the complainants to prove that the defendant does promote a guilty use of them*" (italics ours).

This principle is what is referred to in 13 Corpus Juris, 1122 (Sec. 289) where it is said:

> "Guilty knowledge or intention is essential to liability for contributory infringement."

This court in the *Scribner Case, supra,* refused to hold the defendant Straus liable as a contributory infringer because he did not "induce any person to break his agreements with the complainants."

The chances were considerably against "picking-up" an unathorized performance of "Just Imagine" when defendant turned on its receiving set. Any one of thousands of other selections, speeches, lectures, sport returns or anything audible may have been heard. Any number of lawful results could reasonably follow from the defendant's act in operating its receiving set. Further under the above authorities plaintiffs must prove that defendant promoted or induced the infringement. Not only did plaintiffs fail to prove that defendant procured or promoted or induced the performance of "Just Imagine"' actually "picked-up" in this case but it is expressly stipulated (Cert. p. 6) that "the defendant, Duncan, operated his radio broadcasting station without any connection whatsoever with the company. He selected his own programs and broadcasted them for the benefit of himself and whoever chose to tune in and receive them."

There is nothing inherently unlawful in the operating of a receiving set (and as the loud speakers or ear phones are an integral part of the receiving set as we have heretofore stated it is immaterial whether they are located in a cabinet with the tubes or at

some distance therefrom or even in another room). Plaintiffs admit (p. 29) that the company has an absolute right in the absence of statutory prohibition to operate such a set in its hotel and the constitutionality of a statutory prohibition, even if one existed, might be subject to serious question. The law so far has punished no man for listening to what someone else does. If there is nothing wrongful in the mere act of operating the set, and this is all defendant ever does, any wrongful result is due entirely to the independent act of someone else over whom defendant exercises absolutely no control whatsoever and with whom defendant is in no way connected according to the stipulated facts. The defendant should not be held as a contributory infringer because the broadcaster for the purpose of making his unauthorized performances of copyrighted music public takes advantage of the fact that receiving sets not under his control but reacting solely because of impulses he sends out are being so innocently operated, nor should any liability attach because the company knows what has been played after it is played.

The hypothetical cases put by plaintiffs on pages 25-26 of their brief are not analogies. The first is an impossible situation. If the opera is broadcast, it will be receivable on any receiving set, and no theatre owner would be foolish enough to suppose that people would pay admission to hear over his receiving set exactly what they can hear over their own sets in their own homes. The second is stated as follows (pp. 25-26):

"Again, unless plaintiffs' position is upheld, an infringing broadcaster could transmit sound pictures by television and radio to the many thousand theaters in the United States, for the showing of which each theatre could charge an admission fee, and the copyright owner would be without remedy * * *."

It is very plain that such a situation could only be possible by reason of a most complex, efficient and perfectly timed organization. There would have to be cooperation to the last detail between receiving theaters and broadcasters. There would have to be a method whereby only the theater owners and not the general public could receive the program. On our theory of the case, this necessary cooperation would establish a privity between receivers and broadcasters, and a collusion with the performers which would make each theater owner liable, not as a performer, but as a contributory infringer. Each would be held to be promoting or inducing the performance broadcast. Then again, plaintiff has forgotten that one of the remedies granted by the act is an injunction. It would not be necessary to adopt plaintiffs' theory in order to take care of either of these hypothetical cases. The case before the Court is one where the broadcaster haphazardly broadcasts and the receiver haphazardly receives. There is no connection between the two.

## Conclusion.

It follows from what we have said that Question Number One certified by the Court of Appeals should be answered in the negative. To answer the question in the affirmative would place a construction upon the Copyright Act granting privileges far beyond anything contained in either the spirit or the letter of the Act.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1930.

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No. 138.

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and DE SYLVA, BROWN & HENDERSON, INC., a corporation, *Appellants*,

*vs.*

JEWELL-LA SALLE REALTY COMPANY, a corporation, *Appellee*.

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No. 139.

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and LEO FEIST, INC., a corporation, *Appellants*.

*vs.*

JEWELL-LA SALLE REALTY COMPANY, a corporation, *Appellee*.

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ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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## Motion of National Association of Broadcasters, Inc., for Leave to File Brief as Amicus Curiae, and Brief of Amicus Curiae.

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LOUIS G. CALDWELL,
PHILIP G. LOUCKS,
*Counsel for National Association of Broadcasters, Inc., as Amicus Curiae.*

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ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

May It Please the Court:

The undersigned, as counsel for National Association of Broadcasters, Inc., respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

LOUIS G. CALDWELL,
PHILIP G. LOUCKS,
*Counsel for National Association of Broadcasters, Inc., as Amicus Curiae.*

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

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ON CERTIFICATES FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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# BRIEF OF NATIONAL ASSOCIATION OF BROADCASTERS, INC., AS AMICUS CURIAE.

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## PRELIMINARY STATEMENT.

This brief is directed solely to the following question:

> Question I. Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 U. S. C. Sec. 1 (e)?

This question is the only one certified in No. 138 (p. 7) and is the first of four in the consolidated series of questions certified in Nos. 139 and 140 (pp. 8-9). It was answered in the negative by the District Court below (Buck, *et al.* v. Jewell-LaSalle Realty Company, 32 F. (2d) 366), and by the District Court for the Southern District of California (Buck, *et al.* v. Debaum, *et al.*, 40 F. (2d) 734).

The material portion of Sec. 1 (e) of the Copyright Act of 1909 reads as follows:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right: * * *
>
> "(e) To perform the copyrighted work publicly for profit if it be a musical composition. * * *"

The National Association of Broadcasters, Inc. (hereinafter referred to as the "Association") is a Delaware corporation, not for profit. It has a membership of 136 broadcasting stations (out of a total of about 620) in the United States, including most of the larger and more important stations. As stated in its constitution:

"The object of this Association shall be to foster and promote the development of the art of radio broadcasting; to protect its members in every lawful and proper manner from injustices and unjust exactions; to foster, encourage and promote laws, rules, regulations, customs and practices which will be to the best interest of the public and the radio industry."

The American Society of Composers, Authors and Publishers (hereinafter referred to as the "American Society"), is an unincorporated association with a membership exceeding 700, comprising authors, composers, and publishers of musical works (p. 2).

The certificate does not state, and appellant will not claim, that a license from the American Society for the public performance of the musical compositions controlled by its members will protect the licensee in the use of all copyrighted music used by broadcasting stations; or that there are not important classes of music used by broadcasting stations which are not controlled by the American Society, and as to which *other* organizations claim to have control and licensing authority; or that *any* broadcasting station, no matter how vigilant or how careful it has been to secure licenses from each of the known organizations of music publishers, has yet found it possible to protect itself against infringement claims by independent publishers and composers.

The number of radio receiving sets in use in the United States is generally estimated at approximately thirteen million. The radio audience cannot be exactly determined, but the number of receiving sets indicates its tremendous size.

In behalf of its members as well as of all broadcasting stations, the Association is interested in the above-quoted question for the following reasons:

1. The necessary result of an affirmative answer will be a reduction in the listening audience of broadcasting stations.

2. The question involves a principle of vital importance to broadcasters in more or less analogous situations arising in network or chain broadcasting, international or relay broadcasting, and remote-control broadcasting.

3. An affirmative answer to the question would seriously endanger judicial and legislative recognition of the right of the broadcaster to protection against unauthorized commercial exploitation of his programs by persons receiving those programs by means of receiving sets.

4. The question presents a proper occasion for determination of the underlying issue which has never been passed upon by this Court; i. e., whether in any event a broadcasting station which broadcasts a copyrighted musical composition is engaged in a public performance.

## SUMMARY OF ARGUMENT.

I. The communication, by means of a radio receiving set and one or more loudspeakers, of a broadcast musical composition to listeners, is not a performance of the musical composition.

(1) The proper construction of the word "perform", with reference to the operation of a receiving set, depends on the physical acts constituting the alleged performance, and is independent of whether the broadcasting station is, or is not, licensed by the copyright owner.

(2) The broadcasting of a musical composition involves only one *actual* performance of that composition, i. e., the performance by the musician; the apparatus constituting a broadcasting station and the apparatus constituting a receiving set (linked by an hypothetical medium known as the ether) are like a telephone system and merely serve to communicate the musician's performance to listeners. The broadcaster may, if the musician be his employe, also be held to "perform" but, except for that, the broadcaster's acts consist simply in creating modulated radio waves. With the receiving set "turned on" and "tuned" to the broadcasting station, there is a clear avenue of communication from the musician to the listener. This cycle of purely physical events related by virtually instantaneous cause-and-effect is not strictly analogous to the slow succession of mixed physical events and human acts involved in the manufacture and playing of phonograph records.

(3) The consequences, viewed either practically or from the standpoint of the orderly development of the law, require that radio reception be held not to constitute performance. A contrary holding would be inconsistent with the policy of "free" reception heretofore followed by the United States and would result in reduction of the radio audience. It would

affect the use of devices similar to radio receiving sets and, depending on the principle adopted, would impose new burdens on broadcasting in such situations as those occurring in remote control, network, and international broadcasting. It would, again depending on the principle adopted, have an unfortunate effect on the development of sound legal principles, would introduce confusion where there should be simplicity, and would endanger recognition of legal principles necessary to protect broadcasting stations against unauthorized commercial exploitation of their programs.

II. If the communication by receiving set referred to in Point I is a performance of the musical composition then the broadcaster does not perform *publicly*. The theory on which the courts have hitherto held that the broadcaster does perform publicly is that the public listens to a performance by the broadcaster and not a multitude of performances by receiving-set operators.

(1) If appellant's theory is correct, every person operating a receiving set "performs", the only audience consists of persons listening to loud speaker performances, and, therefore, the broadcaster's "performance" is not public. The theory of "contributory infringement" is not appropriate since it would apply alike to public and private receiving-set operators.

(2) If the analogy between broadcasting and phonograph is correct, then it is clear that the broadcaster does not publicly perform the musical com-

position; he merely manufactures a fleeting record of it on modulated radio waves. The Copyright Act of 1909 does not cover this.

## ARGUMENT.

### Point I.

### The Communication, by Means of a Radio Receiving Set and One or More Loudspeakers, of a Broadcast Musical Composition to Listeners is Not a Performance of the Musical Composition.

Section 1(e) of the Copyright Act of 1909 embodies three essential elements: (1) "perform"; (2) "publicly"; and (3) "for profit." The form in which the question is certified precludes any consideration of the second and third elements in the instant case, and the answer to the question turns exclusively on the proper construction to be given the word "perform."

(1) *The proper construction of the word "perform," with reference to the operation of a receiving set, depends on the physical acts constituting the alleged performance, and is independent of whether the receiving set is operated in public or in private, and of whether the broadcasting station is, or is not, licensed by the copyright owner.*

The physical acts of the person operating a receiving set consist essentially (a) in turning on a switch which provides the electrical current (from batteries or electric light lines) necessary to the operation of the set; (b) in "tuning" the set, by manipulation of a dial, so that it will respond to radio waves having

a given wave-length (or frequency) and proceeding from the desired broadcasting station; and (c) in adjusting, by manipulation of a dial, the amount of electric current used in the set so that the loudspeaker rendition will be of satisfactory volume. These acts may be simply summarized by stating that the person converts complicated electrical disturbances, which are known as modulated radio waves and are produced by a broadcasting station, into sound waves.

These acts are physically the same, whether done by a hotel proprietor in his public rooms for the entertainment of his guests or by a private owner of a receiving set in his home for the entertainment of himself and his guests. They are also physically the same, whether the broadcasting station to which the set is tuned happens to be licensed by the copyright owner or whether it is an infringer. If to turn on the switch and manipulate the dials is to "perform" in one case, so also is it in the other.

The intention, so far as it is material and concerns the word "perform," is the same in both cases. It is conceivable that a person, not knowing that a particular apparatus is a radio receiving set, or ignorant of its functions, might set it in operation accidentally. With this exception, every person operating a set intends the same result; i. e., the completion of the cycle of physical events by which a broadcast program is brought to the ears of all who happen to be within range of the londspeaker. Such circumstances as the public or private character of the place where the loudspeaker is located have to do only with whether the occurrence is "public" and "for profit." Likewise, the circumstance that the broadcasting

station is or is not licensed by the copyright owner has nothing to do with the fundamental question as to whether the occurrence is a "performance" of the copyrighted composition. Even if the receiving-set owner, knowing that the broadcasting station is not licensed and that the station will without authority broadcast a copyrighted composition at a given hour, intentionally operates the set so as to receive the composition, the question as to whether he "performs" is exactly the same as that presented in the present case where the LaSalle Hotel Company had no such knowledge or intention (p. 6).

Consequently, the statement made by Judge McCormick in *Buck v. Debaum*, 40 F. (2d) 734, 736, with reference to the opinion of Judge Otis in the instant case; i. e.,

> "* * * as far as the case discusses the meaning to be given to the word 'perform' in the Copyright Act, the decision is authority in this suit."

is neither incorrect nor *dictum*, as will be claimed by appellants.

(2) ***The broadcasting of a musical composition involves only one actual performance of that composition, i. e., the performance by the musician; the apparatus constituting a broadcasting station and the apparatus constituting a receiving set, like a telephone system, merely serve to communicate the musician's performance to listeners.***

No extended discussion of the facts and principles of radio physics is necessary. The cycle of events

constituting the broadcasting and reception of a musical composition may be very simply stated.

The cycle begins with a performance of the composition by voice or by musical instruments; for convenience, it will be assumed to be by a single musician. The performance usually takes place in the studio of a broadcasting station. Frequently, however, it takes place elsewhere, at points commonly called "remote-control pick-ups", such as churches, theatres, dance-halls, hotels, restaurants, or on the college gridiron where a college band plays the composition during the intermission between halves in a football game.

Wherever the performance takes place, the musician's acts cause sound waves in the air which in turn cause vibrations in the diaphragm of a microphone connected by wire with the broadcasting station's transmitter. From that point on, there occurs a series of electrical phenomena which ends with the reproduction of the sound waves by a loudspeaker attached to a receiving set. The whole occurrence is like the transmission of a communication over a telephone system except that (a) the electrical phenomena are more complicated and involve, over the larger portion of the route between the musician and the listener, the use of radio waves traveling through an hypothetical medium called the ether, instead of through a tangible medium such as the wire (and sometimes the ground); (b) this medium, the ether, is not owned by the broadcaster, whereas the wire line is owned by the telephone company; (c) the radio receiver is usually owned by the person operating it, whereas the telephone receiver is usually rented from the telephone company; (d) in many

cases the broadcaster employs or otherwise controls the musician while the telephone company does not employ or otherwise control the person speaking over the telephone, and (e) the communication from musician to radio listener is all one-way whereas the ordinary telephone communication is two-way.

Throughout the entire series of events, which, for all practical purposes, occur simultaneously, only one performance has taken place, that of the musician who set the original sound waves in motion. Once they are set in motion, the acts of all others consist simply in *communicating* the musician's performance to the public. The broadcaster may, if the musician be his employe, also be held to "perform" but, except for that, the broadcaster's acts consist simply in creating the modulated radio waves. The receiving-set operator, who has no control over the musician, cannot be held to "perform"; his acts consist simply in reconverting the modulated radio waves into sound waves intelligible to himself and to any other persons within the audible range of his loudspeaker.

With the broadcasting station in operation and with the receiving set "turned on" and "tuned" to the broadcasting station, the sound waves originally produced by the musician set in motion a cycle of physical phenomena, related by a chain of pure cause-and-effect dependent on immutable scientific laws and uninfluenced by any human intervention. *There is a clear avenue of communication from the musician to the listener.* If, while that avenue is open, and during the course of a program (which may be a church service or a football game), the musician happens to play a copyrighted musical composition, this is not by reason of any act, command

or request of the person operating the receiving set.

The foregoing reasoning is, in substance, that adopted by the District Judge in the instant case, *Buck v. Jewell La Salle Realty Co.*, 32 F. (2d) 366, and approved by the District Judge in *Buck v. Debaum*, 40 F. (2d) 734. No better test of the soundness of this reasoning can be suggested than that implied in the following question: if it be assumed that a person desires to afford to listeners a rendition of a particular musical composition, can he do so solely by means of a radio receiving set? See *Dunbar v. Spratt-Snyder Co.* (Ia., 1929), 226 N. W. 22, in which it was held that a radio receiving set is not a "musical instrument" within the meaning of that term as used in an Iowa exemption statute.

It seems unnecessary to comment at length upon the differences between radio reception and the playing of phonograph records, which are pointed out by the District Judges both in the instant case and in *Buck v. Debaum, supra.* The chain of purely physical events related by virtually instantaneous cause-and-effect, which occurs when a musician's performance is broadcast to listeners, has little resemblance to the slow succession of mixed physical events and human acts consisting of the manufacture of a disque recording a musician's performance, the retailing of the record, its purchase, and the eventual playing of it from time to time by individual purchasers. Once the broadcasting cycle of sound waves, electrical disturbances, and again sound waves is permitted to die away, the performance is over and has vanished into the past beyond recall. To be repeated the musician must play again. With each playing of a phonograph record, a new cycle of sound waves is

set in motion, the nature of which depends upon the choice and act of the person playing the record. See *Brand Co.*, 2 United States, 47 T. D. 40649-b. A. 8929 (1925), in which it was held that a radio set is not a "similar article" to a phonograph under the Tariff Act.

If any analogy is to be enlisted, let broadcasting be compared with the telephone and let phonograph-record playing be compared with reading a written letter delivered by the post-office. The letter may be read and re-read at the will of the addressee; the voice over the telephone cannot be heard again unless the original speaker calls a second time.

3. *The consequences, viewed either practically or from the standpoint of the orderly development of the law, require that radio reception be held not to constitute performance.*

For convenience, the construction of "perform" heretofore urged in this brief will be called the "single performance" theory; the construction urged by appellants will be called the "multiple performance" theory. The terms are, of course, derived from the consideration that under the former theory, the only performance which takes place is that of the musician, while under the latter every person who takes part in communicating the performance to listeners is himself a performer, with the result that each broadcasting of a musical composition involves "performances" by countless persons. It must be kept in mind that under this heading we assume the correctness of the partly legal conclusions which have found their way into the "Statement of Facts" in the certificate in the instant case, wherein the Court states with reference to the broadcasting station KWKC:

> "Such renditions and performances were public and were made available to the public, and were for the purposes of profit, both for said defendant and for others using the station or procuring their names or business to be mentioned over it" (p. 4),

in other words, that the broadcasting of a musical composition is a public performance thereof for profit.

The consequences of the "multiple performance" theory are such as to cause grave apprehension. They may be summarized as follows:

(a) *Effect on the audience of broadcasting stations.* The United States, unlike most of the other countries in the world, has not adopted the system of licensing or taxing radio receiving sets. In many foreign countries, where broadcasting stations are operated by the governments either directly or indirectly through government-controlled corporations, the proceeds of receiving-set license fees are used in part to defray the expense of operating the broadcasting stations. In the United States reception is "free" and by all portents will remain so. To this policy may be ascribed, at least in part, the fact that the United States is immeasurably in advance of the rest of the world in *per capita* ownership and use of radio receiving sets, and broadcasting is a far more effective and more popular means of mass communication than elsewhere. Adoption of the multiple performance theory will necessarily effect some reduction in the radio audience by making hazardous the operation of receiving sets in hotel

lobbies and hotel rooms, restaurants, retail radio stores, railroad club cars, dance-halls, theaters, moving-picture houses, hospitals and other public places. The copyright owners, who are given complete monopolies for the term of protection, without regulation as to rates and without restriction against discrimination, will be given power to impose burdensome, arbitrary, and discriminatory license fees on persons operating receiving sets in such places.

Even, however, should the copyright owners pursue a reasonable course, there is no way in which the receiving-set owner can protect himself fully against claim of infringement. During the period of five years ending in 1929 alone, there were copyrighted 130,234 musical compositions (Thirty-Second Annual Report of Register of Copyrights, June 30, 1929, p. 28). The receiving-set owner has no control over what will be broadcast by the many broadcasters to whose stations he may tune, and cannot be expected to ascertain each broadcaster's program in detail in advance. In fact, the broadcaster himself frequently does not know what musical compositions will be performed before his microphone, as in the case of a college band during a football game.

The certificate does not state, and appellants will not claim, that a receiving-set owner can obtain a license from the American Society which will protect him as to all music likely to be broadcast, or that there is not a large body of music not covered by any blanket license from any organization. Even if the certificate did so state, it cannot be assumed that the American Society, which after all is an organization of private individuals and not a govern-

mental institution, will continue in existence. It is not certain that such an organization, if it should have or acquire control of all or the larger portion of music used by broadcasting stations, would not violate the federal anti-trust laws. *United States v. Standard Oil Co.* (N. D. Ill., E. D., 1929), 33 F. (2d) 617.

(b) *Effect on use of devices similar to radio receiving sets.* If the operation of a receiving set is a performance, so also is the operation of an amplifier in a public hall, or one connected with a public hall and located in other rooms in the same building. The sound waves caused by the musician's performance on the stage are converted into electrical phenomena carried by wire to loudspeakers which reconvert the electrical phenomena into sound waves. Under the "multiple performance" theory, if in a large auditorium there are twenty amplifiers, twenty performances of the musical composition will take place in addition to that of the musician, and the proprietor will be liable for at least twenty-one times the minimum statutory damages.

(c) *Effect on analogous situations in broadcasting.* Broadcasting frequently involves much more complicated processes than those involved in the simple case where the broadcaster transmits the musician's performance directly from his studio to receiving sets. The three important situations, of which a number of variations are possible, and all three of which may be present in a given case, are the following:

*Remote control broadcasting.* The words "remote control" are here used to denote the fact that the performance takes place at some point other than the broadcasting station's studio (not, however, in-

cluding another radio station) with a wire connection from such other point to the station transmitter. Instances of this are legion and include churches, theaters, hotels, restaurants, dance-halls, the college gridiron, legislative halls, and many others, from which a variety of events may be communicated, usually including a large amount of copyrighted music. In a few cases, of course, the broadcaster controls the musician; in most cases, he does not. In many instances (*e. g.*, hotel and restaurant orchestras, under the doctrine of Herbert v. Shanley, 242 U. S. 591) the performance is already public and for profit, independently of the presence of the microphone. Yet it has been held by two District Judges sitting successively in the same case, first, that if the musician's performance is authorized then

> "Such broadcasting merely gives the authorized performer a larger audience and is not to be regarded as a separate and distinct performance of the copyrighted composition upon the part of the broadcaster." (*Jerome H. Remick & Co. v. General Electric Co.*, S. D. N. Y., 1924, 4 F. (2d) 160).

and second, that if the musician's performance is unauthorized then the broadcaster is guilty of "contributory infringement" (*same v. same*, 16 F. (2d) 829). There is nothing in either opinion to indicate whether the broadcaster knew that the original performance was unauthorized, and only the first opinion clearly recognizes the distinction between *performing* (either directly or through an employee) and *communicating another's performance.*

*Network or chain broadcasting.* In this situation

the original performance takes place at the studio (or at a remote control pick-up point) of the key-station of a network of broadcasting stations interconnected by wire, and is broadcast simultaneously both from the key-station and each of the interconnected stations. The latter are for the most part separately owned and operated, and only a comparatively small portion of their daily schedules consists of chain programs. Each station transmits to its own audience the performance relayed from the key-station. Such hook-ups vary from two to over a hundred stations for a single program. Does each station "perform" the musical composition which is already performed by the musician?

*International or relay broadcasting.* In this situation the original performance takes place at the studio (or at a remote control pick-up point) of a foreign broadcasting station, usually in Europe, and is broadcast by that station to its own audience on its regular broadcasting wave length. The same performance is simultaneously transmitted by "short waves" (radio waves with a high frequency which, because of their peculiar properties, are useful for communication over very long distances) to all parts of the world, where they may be captured and utilized directly by persons having receiving sets adapted for such reception. These waves are also received at broadcasting stations in the United States (usually at the key-stations of national networks), relayed to other stations by wire, and broadcast to the public. In this kind of broadcasting, while the process is much more complicated and involves the opening of more gateways before there is a clear avenue of communication from the musician in Europe to the listener

in the United States, the cycle of events is still one of purely physical cause-and-effect, resembling international telephony. No station in the United States has control over the musician's performance in Europe. A particular musical composition may have fallen into the public domain in Germany and yet have copyright protection in the United States. Is each station in the United States a "performer" of the composition which it transmits under such circumstances?

(d) *Effect on orderly development of sound legal principles.* Sufficient has been stated to show that under the "single performance" theory, a very desirable logic and simplicity will rule the juridical relations between the parties. Under the law the copyright owner has complete control over the original performance, and by exercising that control he may make impossible any communication of that performance to the public by radio broadcasting and reception. No one else has that power, neither the receiving set operator, nor the member station of a network, nor the station receiving a program by short waves from abroad, nor the station receiving a program from a remote control pick-up point.

If, however, the copyright owner is to be given such rights against those who merely communicate a performance (and we do not agree that he should be), let it be done not by a strained judicial construction of the word "perform," but by legislation in which to "communicate" a copyrighted work is specifically made an infringement. This has been recognized by Congress in legislation now pending before it (the Vestal Copyright Bill, H. R. 12549, 71st Congress, 2d session, Report No. 2016) which was passed by the

House of Representatives on January 13, 1931; Section 1 (g) enumerates *communication* to the public for profit by wire or by radio broadcasting as an exclusive right of the author separate and apart from a public performance for profit, which is enumerated as Section 1 (d).

The "multiple performance" theory will wholly or partially block development of legal principles which, as is already apparent, will be necessary to the future protection of the broadcaster, particularly if and when practical radio television is achieved. The broadcast program, made up though it is in large measure of the works of others, calls for creative effort and genius, and is susceptible of unauthorized appropriation to the unjust enrichment of the appropriators. The nature of the practices against which the broadcaster will need protection is clearly indicated by occurrences which have already taken place in both the United States and Europe. To avoid enumerating these practices we take the liberty of citing a chapter in the leading American treatise on radio law, and a portion of the leading German treatise on radio law. Stephen Davis, *Law of Radio Communication*, New York, 1927, Chapter IX on "Control of Broadcast Programs," p. 140; Dr. Eberhard Neugebaner, *Fernmelderecht mit Rundfunkrecht*, Berlin, 1929, pp. 707 *et seq.* These practices indicate that, to attain the needed protection, the broadcaster may eventually have to have control over unauthorized commercial exploitation of his programs by persons operating receiving sets, either by the extension of existing recognized principles such as those governing unfair competition, or by legislation. If the copyright owner, who has already been paid by

the broadcaster for the use of his work in a program, is also to control the receiving set operator, it is unlikely that the broadcaster's claims against the same person will ever be recognized.

## Point II.

### If the Communication by Receiving Set Referred to in Point I is a Performance of the Musical Composition, then the Broadcaster Does Not Perform Publicly.

Under Point I we have assumed that the broadcaster gives a public performance for profit of each musical composition he transmits, at least where the original performance takes place in his studio or by a musician in his employ. The Circuit Court of Appeals has specifically made the same assumption in its certificate (p. 6). Whether or not these assumptions are correct involves the soundness of the decisions in M. Witmark & Sons v. L. Bamberger & Co. (D., N. J. 1923), 291 F. 776; Jerome H. Remick & Co. v. American Automobile Accessories Co. (C. C. A. 6th, 1925) 5 F. (2d) 411 (certiorari denied, 1925, 269 U. S. 556), and perhaps also Jerome H. Remick & Co. v. General Electric Co. (S. D. N. Y., 1926), 16 F. (2d) 829, as contrasted with the decision of the lower court in Jerome H. Remick & Co. v. American Automobile Accessories Co. (S. D., Ohio, W. D., 1924) 298 F. 628, and the interlocutory decision in Jerome H. Remick & Co. v. General Electric Co. (S. D., N. Y., 1924), 4 F. (2d) 160.

It will suffice to point out that the leading case holding the broadcaster to be engaged in a public performance for profit, the decision of the Sixth Cir-

cuit Court of Appeals, *supra* (in which certiorari was denied by this Court), is based on the theory that persons gathered about receiving sets are listening to a performance by the broadcaster and not a multitude of performances by receiving-set operators. This is clearly indicated in the following paragraph from the court's opinion:

> A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance. (p. 412.)

It is the purpose of this portion of our brief to demonstrate that if the appellant's theory be correct, the conclusion reached by the Sixth Circuit Court of Appeals is erroneous.

(1) *If appellant's theory is correct, every person operating a receiving set "performs", the only audience consists of persons listening to loudspeaker performances, and therefore the broadcaster's "performance" is not public.*

Under our Point I (1) we have argued that the proper construction of the word "perform" is inde-

pendent of whether the receiving set is operated in public or in private. Under appellants' theory, *all* persons operating receiving sets become "performers." *All* persons hearing the resulting sound waves are listening to performances by the receiving set operators. *No* member of the public is listening to the performance which takes place in the studio of the broadcasting station.

If all this be so, the broadcaster has no audience. He may be guilty of a mere performance in the privacy of his studio, but it does not become public by reason of his broadcasting.

Nor is the theory of "contributory infringement" appropriate, unless it be held that every receiving set operator, public or private, contributes to the infringement by converting the inaudible into the audible. It is the aggregate of listeners, in private homes as well as in public places, which constitutes the public referred to in the above-quoted portion of the decision of the Sixth Circuit Court of Appeals.

(2) *If the analogy between broadcasting and phonograph record is correct, then it is clear that the broadcaster does not publicly perform the musical composition; he merely manufactures a fleeting record by modulating radio waves.*

It will be contended that there is no difference "in principle between playing by phonograph a record impressed on bakelite and playing by radio receiver a record impressed on the ether." (Buck v. Jewell-LaSalle Realty Co., 32 F. (2d) 366, 367.) We are content to accept the contention as correct since its necessary corollary is that broadcasting does not involve a public performance.

It has never been held, or even suggested, that the manufacture of a phonograph record is a public performance of the musical composition impressed on the record; such a holding would necessarily assume that the "public" to which the composition is communicated, consists of the persons who may eventually hear the records played on phonographs. Prior to the Copyright Act of 1909, which for the first time protected the composer against the use of his composition in records or other instrument for mechanical reproduction, the recording of a musical composition in the form of a phonograph record or a perforated piano player roll was not a "copy" of the composition (White-Smith Publishing Co. v. Apollo Co., 209 U. S. 1; Stern v. Rosey, 17 App. D. C. 562). By virtue of amendments to the previous statute, embodied in Sec. 1 (e) of the Copyright Act of 1909, the composer was given the additional exclusive right

> "for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."

Thus Congress has not described the manufacture of records as a performance but has given it a separate classification. It has not yet provided a classification which covers the "manufacture" of modulated radio waves.

Without the acts of receiving-set operators (who, according to appellants, are performing just as they would if they were playing phonograph records), the Hertzian waves, launched into the hypothetical ether

from the broadcasting station antennae, would speed to the outer limits of the universe, unheard and unintelligible, as mute as a disque of bakelite when the phonograph is not in motion.

## CONCLUSION.

This case, we believe, presents three possible alternative answers to the question certified: (1) that urged under Point I of our brief, the "single performance" theory, (2) that urged by appellants, the "multiple performance" theory, and (3) that urged under Point II of our brief, by which the phonograph analogy is accepted with its logical corollary, *i. e.*, that the broadcaster does not perform publicly. Of these, the National Association of Broadcasters, Inc., urges the Court not to adopt the second, both because of its inherent unsoundness and because of its unfortunate consequences. The third has some measure of logic to support it although it is not free from objection as to its consequences.

The National Association of Broadcasters, Inc., urges that this Court either (1) answer the question in the negative or (2), if the Court should answer it in the affirmative, it do so according to principles under which it will be held that the broadcaster, in the circumstances indicated, does not perform the copyrighted musical composition publicly.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

Nos. 138 and 139.—October Term, 1930.

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| 138 | Gene Buck, as President, et al., *vs.* Jewell-LaSalle Realty Co. | On Certificate from the United States Circuit Court of Appeals for the Eighth Circuit. |
| 139 | Gene Buck, as President, et al., *vs.* Jewell-LaSalle Realty Co. | |

[April 13, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

These suits were brought in the federal court for western Missouri by the American Society of Composers, Authors and Publishers, and one of its members, against the Jewell-LaSalle Realty Company, which operates the LaSalle Hotel at Kansas City. The hotel maintains a master radio receiving set which is wired to each of the public and private rooms. As part of the service offered to its guests, loud-speakers or head-phones are provided so that a program received on the master set can, if desired, be simultaneously heard throughout the building. Among the programs received are those transmitted by Wilson Duncan who operates a duly licensed commercial broadcasting station in the same city. Duncan selects his own programs and broadcasts them for profit. There is no arrangement of any kind between him and the hotel. Both were notified by the plaintiff society of the existence of its copyrights and were advised that unless a license were obtained, performance of any copyrighted musical composition owned by its members was forbidden. Thereafter, a copyrighted popular song, owned by the plaintiffs, was repeatedly broadcast by Duncan and was received by the hotel company and made available to its guests. Suits were brought for an injunction and damages for the alleged infringements.[1] After a hearing on stipulated facts, relief against

[1] In No. 138, Duncan was joined as a defendant and a decree *pro confesso* for failure to answer was entered against him. In No. 139, the hotel company was the only defendant. See also No. 140, decided this day.

the hotel company was denied on the ground that its acts did not constitute a "performance" within the Copyright Act. *Buck* v. *Duncan*, 32 F. (2d) 366. Plaintiffs appealed to the Circuit Court of Appeals which certified the following question:

"Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 USC Sec. 1 (e)?"

The provision referred to is § 1 of the Copyright Act of March 4, 1909, c. 320, 35 Stat. 1075, which provides that: "Any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right: . . . (e) To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit."

The parties agree that the owner of a private radio receiving set who in his own home invites friends to hear a musical composition which is being broadcast, would not be liable for infringement. For even if this be deemed a performance, it is neither public nor for profit. Compare *Herbert* v. *Shanley Co.*, 242 U. S. 591. The contention that what the hotel company does is not a performance within the meaning of the Copyright Act is urged on three grounds.

*First.* The defendant contends that the Copyright Act may not reasonably be construed as applicable to one who merely receives a composition which is being broadcast. Although the art of radio broadcasting was unknown at the time the Copyright Act of 1909 was passed, and the means of transmission and reception now employed is wholly unlike any then in use,[2] it is not denied that such broadcasting may be within the scope of the Act.[3] Compare

[2]Station KDKA, erected in Pittsburg in 1920, was the pioneer commercial broadcasting station in the world. The Radio Industry, Harvard Graduate School of Business Administration Lectures, 1927-28, pp. 195-209. The latest amendment of the Copyright Act which added new classes of copyrights was that of August 24, 1912, c. 356, 37 Stat. 488.

[3]See M. Witmark & Sons v. L. Bamberger Co., 291 Fed. 776; Remick & Co. v. American Automobile Accessories Co., 5 F. (2d) 411; Remick & Co. v. General Electric Co., 16 F. (2d) 829. See also Messager v. British Broad-

*Kalem Co.* v. *Harper Bros.*, 222 U. S. 55; *Gambart* v. *Ball*, 14 C. B. (N. S.) 306, 319. The argument here urged, however, is that since the transmitting of a musical composition by a commercial broadcasting station is a public performance for profit, control of the initial radio rendition exhausts the monopolies conferred—both that of making copies (including records) and that of giving public performances for profit (including mechanical performances from a record); and that a monopoly of the reception, for commercial purposes, of this same rendition is not warranted by the Act. The analogy is invoked of the rule under which an author who permits copies of his writings to be made cannot, by virtue of his copyright, prevent or restrict the transfer of such copies. Compare *Bobbs-Merrill* v. *Straus*, 210 U. S. 359. This analogy is inapplicable. It is true that control of the sale of copies is not permitted by the Act,* but a monopoly is expressly granted of all public performances for profit.

The defendant next urges that it did not perform because there can be but one actual performance each time a copyrighted selection is rendered; and that if the broadcaster is held to be a performer, one who, without connivance, receives and distributes the transmitted selection cannot also be held to have performed it. But nothing in the Act circumscribes the meaning to be attributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer. Compare *Kalem Company* v. *Harper Bros.*,

casting Co., Ltd. [1927] 2 K. B. 543, reversed [1928] 1 K. B. 660, affirmed, [1929] A. C. 151; Chappell & Co., Ltd. v. Associated Radio Co. of Australia, Ltd., [1925] Vict. L. R. 350.

*The rule of the Bobbs-Merrill case was enacted into the Copyright Act of March 4, 1909, c. 320, § 41, 35 Stat. 1075, 1084. See H. Rep. No. 2222, 60th Cong., 2d Sess., February 22, 1909, p. 19. It is applicable only where there is no relation between the manufacturer of the copy and the purchaser which might make the latter liable as a contributory infringer. Compare Scribner v. Straus, 210 U. S. 352, 355. In the case at bar, the stipulated facts show that there was no relation whatever between the broadcaster and the hotel company so that even if the broadcasting constituted an infringement, there would be no question of contributory infringement.

222 U. S. 55, 63. No reason is suggested why there may not be more than one liability. And since the public reception for profit in itself constitutes an infringement, we have no occasion to determine under what circumstances a broadcaster will be held to be a performer, or the effect upon others of his paying a license fee.

The defendant contends further that the acts of the hotel company were not a performance because no detailed choice of selections was given to it. In support of this contention it is pointed out that the operator of a radio receiving set cannot render at will a performance of any composition but must accept whatever program is transmitted during the broadcasting period. Intention to infringe is not essential under the Act. Compare *Hein* v. *Harris*, 175 Fed. 875, affirmed, 183 Fed. 107; *Stern* v. *Remick & Co.*, 175 Fed. 282; *Haas* v. *Leo Feist, Inc.*, 234 Fed. 105; *M. Witmark & Sons* v. *Callaway*, 22 F. (2d) 412, 414. And knowledge of the particular selection to be played or received is immaterial. One who hires an orchestra for a public performance for profit is not relieved from a charge of infringement merely because he does not select the particular program to be played. Similarly, when he tunes in on a broadcasting station, for his own commercial purposes, he necessarily assumes the risk that in so doing he may infringe the performing rights of another. Compare *Harms* v. *Cohen*, 279 Fed. 276, 278; *M. Witmark & Sons* v. *Pastime Amusement Co.*, 298 Fed. 470, 475, affirmed, 2 F. (2d) 1020; *M. Witmark & Sons* v. *Calloway*, 22 F. (2d) 412, 413. It may be that proper control over broadcasting programs would automatically secure to the copyright owner sufficient protection from unauthorized public performances by use of a radio receiving set,[5] and that this might justify legislation denying relief against those who in using the receiving set innocently invade the copyright,[6] but the existing statute makes no such exception.

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[5] If the copyrighted composition had been broadcast by Duncan with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied. Compare Buck v. Debaum, 40 F. (2d) 734. But Duncan was not licensed; and the position of the hotel company is not unlike that of one who publicly performs for profit by the use of an unlicensed phonograph record.

[6] See the so-called Vestal Copyright bill, which failed of passage in the Seventy-first Congress. H. R. 12549, 71st Cong., 2d Sess., § 15 (d). Compare Note 10, *infra*. See also arguments concerning the broadcasting of copy-

*Second.* The defendant contends that there was no performance because the reception of a radio broadcast is no different from listening to a distant rendition of the same program.[7] We are satisfied that the reception of a radio broadcast and its translation into audible sound is not a mere audition of the original program. It is essentially a reproduction. As to the general theory of radio transmission there is no disagreement. All sounds consist of waves of relatively low frequencies which ordinarily pass through the air and are locally audible. Thus music played at a distant broadcasting studio is not directly heard at the receiving set. In the microphone of the radio transmitter the sound waves are used to modulate electrical currents of relatively high frequencies which are broadcast through an entirely different medium, conventionally known as the "ether". These radio waves are not audible.[8] In the receiving set they are rectified; that is, converted into direct currents which actuate the loud-speaker to produce again in the air sound waves of audible frequencies. The modulation of

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righted selections as set forth in Joint Hearings before the Committees on Patents, on S. 2328 and H. R. 10353, 69th Cong., 1st Sess., April 5-9, 1926; Hearings before the Senate Committee on Patents, on H. R. 12549, 71st Cong., 3d Sess., January 28-29, 1931, pp. 52, *et seq.*; Sen. Rep. No. 1732, *id.*, February 17, 1931, p. 29.

[7]This argument is based upon an elaborate discussion of the theory of radio transmission and reception. Defendant's hypothesis is that the energy which actuates the receiving apparatus—that is, which varies the currents in the receiver to produce audible sound—is part of the original energy exerted upon the air by the performer. Hence it is urged that the radio receiving set is no more than a mechanical or electrical ear-trumpet for the better audition of a distant performance.

[8]Sound waves, which can pass through air, water, or solids, and radio or other electromagnetic waves, which operate in the "ether", behave similarly in many respects. Yet not only are the latter inaudible but they travel at relatively tremendous speeds. Sound waves travel at ordinary temperatures approximately 1100 feet a second, electromagnetic waves with the speed of light, or about 186,000 miles per second. This velocity is dependent solely upon the particular medium through which the various kinds of waves travel. See Morecroft, Principles of Radio Communication, c. IV. Thus, broadcast time signals can be heard practically simultaneously on receiving sets hundreds of miles apart; ordinary sound signals cannot. Compare as to the general theory of radio communication, Radio Corp. of America *v.* Twentieth Century Radio Corp., 19 F. (2d) 290, 291; Chappell & Co., Ltd. *v.* Associated Radio Co. (1925), 50 Victoria Law Reports 350, 357-8.

the radio waves in the transmitting apparatus, by the audible sound waves is comparable to the manner in which the wax phonograph record is impressed by these same waves through the medium of a recording stylus.[9] The transmitted radio waves require a receiving set for their detection and translation into audible sound waves, just as the record requires another mechanism for the reproduction of the recorded composition. In neither case is the original program heard; and, in the former, complicated electrical instrumentalities are necessary for its adequate reception and distribution. Reproduction in both cases amounts to a performance. Compare *Buck* v. *Heretis*, 24 F. (2d) 876; *Irving Berlin, Inc.* v. *Daigle*, 31 F. (2d) 832, 833. In addition, the ordinary receiving set, and the distributing apparatus here employed by the hotel company are equipped to amplify the broadcast program after it has been received. Such acts clearly are more than the use of mere mechanical acoustic devices for the better hearing of the original program. The guests of the hotel hear a reproduction brought about by the acts of the hotel in (1) installing, (2) supplying electric current to, and (3) operating the radio receiving set and loud-speakers. There is no difference in substance between the case where a hotel engages an orchestra to furnish the music and that where, by means of the radio set and loud-speakers here employed, it furnishes the same music for the same purpose. In each the music is produced by instrumentalities under its control.[10]

[9]The impressions on the phonograph disc are of course permanent whereas the modulations of the carrier radio waves, continually emitted by the sending station, are ephemeral. But in both cases the means used to transmit the selection being played are wholly different from the musical sounds themselves, and require an additional mechanism, not under the control of the performer, for the recreation of the original music.

[10]At the present time there are renewed proposals for the revision of the Copyright Act in the light of new conditions. See summaries in the Annual Report of the Register of Copyrights (1928), pp. 6-13; *id.* (1929), pp. 16-24; *id.* (1930), pp. 8-13. See also the so-called Vestal Bill, the most recent of these, introduced in the Seventy-first Congress on May 22, 1930. H. R. 12549, 71st Cong., 2d Sess., § 1 (d), § (g); Sen. Rep. No. 1732, *id.*, 3d Sess., Feb. 17, 1931, pp. 4-5, 29. Compare Hearings before the Senate Committee on Patents on H. R. 12549, *id.*, January 28-29, 1931, pp. 25, *passim*. This measure was debated at length in the Senate, but was not reached on the final calendar. See 74 Cong. Rec., Pt. IV, pp. 6213-6849; *id.*, Pt. V, p. 33.

*Third.* The defendant contends that there was no performance within the meaning of the Act because it is not shown that the hotel operated the receiving set and loud-speakers for profit. Unless such acts were carried on for profit, there can, of course, be no liability. But whether there was a performance does not depend upon the existence of the profit motive. The question submitted does not call for a determination whether the acts of the hotel company recited in the certificate constitute operation for profit.

The question certified, is answered

*Yes.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*